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No. 93-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

IN RE CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,
Petitioners

v.

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP,
Real-Parties In Interest

ON PETITION FOR A WRIT OF MANDAMUS (OR CERTIORARI UNDER RULE 11) TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AND THE HON. JAMES R. BROWNING, AND WILLIAM C. CANBY, JR., CIRCUIT JUDGES, AND ROBERT J. KELLEHER, SENIOR DISTRICT JUDGE SITTING BY DESIGNATION

PETITION FOR A WRIT OF MANDAMUS (OR CERTIORARI UNDER RULE 11) TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

ON PETITION FOR WRIT OF MANDAMUS

AND WRIT OF CERTIORARI

UNDER RULE 11 OF THE U.S. SUPREME COURT

I

Whether, the Huffman abstention doctrine is to be applied differently from other abstention doctrines; that is, under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), must the United States District Court defer to the state court judicial system and dismiss for lack of subject matter jurisdiction the federal civil rights action of a State of Nevada citizen which seeks to enjoin enforcement of a quasi-judicial order of the Henderson City Council, sitting as a hearing board for the State of Nevada; which revoked the federal plaintiffs' business license to do business in Henderson, Nevada, based on the City Council's finding of a fraudulent business license application; which

order was pending in the state system and had been issued and served, but stayed for 10 days to permit an appeal to the Nevada State District Court; during which stay the Nevada citizen filed a civil rights lawsuit for an injunction under 42 U.S.C. Section 1983 in which the federal plaintiffs did not make any effort to plead and prove the requisite "extraordinary circumstances," nor did the United States District Court require that said issue be considered; the lack of which the City of Henderson pleaded as a defense on a motion to dismiss for lack of subject matter jurisdiction under the Eleventh Amendment and this Court's abstention ruling in Huffman, supra.

II

Whether an Opinion expressing a unanimous decision of the Court of Appeals for the Ninth Circuit:

(1) that the principles of law

expressed by Chief Justice Rhenquist in Huffman v. Pursue, Ltd. control and that the abstention doctrine applies to the facts set forth; and

(2) that the federal plaintiffs have not stated a cause of action which establishes subject matter jurisdiction for a federal injunction under 42 U.S.C. Section 1983; and

(3) that the cause of action must be dismissed for lack of subject matter jursidiction; and

(4) in which the Court has made findings of fact and conclusions of law and entered a Judgment thereon, in a written Opinion which the Court has certified for publication as meeting the federal standards set forth in Rule 36 of the Federal Rules of Appellate Procedure and which has been published as 8

F.3d 1348 (CA 9, 1993);

may thereafter be withdrawn by the Court without providing a good and lawful reason?

III

Whether the Ninth Circuit Court of Appeals Order dated April 7, 1994 reading "The petition for rehearing is granted. The opinion reported at 8 F.3d 1348 (CA 9 1993) is withdrawn" is void for: (1) "lack of subject matter jurisdiction," and (2) its failure to give <u>any</u> reason for the withdrawal?

IIIa

Whether a writ of mandamus will lie to require that the April 7, 1994 Order be vacated as a void order?

IV

Whether the Ninth Circuit Court of Appeals Memorandum, dated May 4, 1994, is also void because of (1) lack of subject matter jurisdiction, and (2) it also does not address the underlying issue that the Opinion and Judgment on November 2, 1993 may not be withdraw except for a "good and lawful reason"?

IVa

Whether a writ of mandamus will lie to require that: (1) the Court of Appeals' May 4, 1994 Memorandum be vacated as a void Order, and (2) the November 2, 1993 Opinion and Judgment be reinstated?

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES..... ix

QUESTIONS PRESENTED ON PETITION FOR WRIT OF MANDAMUS AND WRIT OF CERTIORARI UNDER RULE 11 OF THE U.S. SUPREME COURT..... i

INTRODUCTION..... 1

OPINIONS BELOW..... 6

JURISDICTION..... 7

STATUTORY PROVISION INVOLVED..... 9

STATEMENT OF FACTS..... 9

Background..... 9

STATEMENT OF THE CASE..... 21

REASONS FOR GRANTING THE WRIT OF MANDAMUS (OR CERTIORARI UNDER RULE 11..... 42

I. THE CITY OF HENDERSON'S "HUFFMAN" CHALLENGE BEFORE THE FEDERAL COURT INVOKED FOUR BASIC JURISDICTIONAL PRINCIPLES OF LAW WHICH ARE NEVER WAIVED..... 44

II. THE JURISDICTION ISSUE WAS NOT MOOT..... 47

III. THE COURT OF APPEALS SHOULD BE ORDERED TO WITHDRAW ITS MAY 4, 1994 MEMORANDUM AS A DECISION WHICH IS ULTRA VIRES, BEING IN EXCESS OF THE COURT'S "SUBJECT MATTER JURSIDICTION"..... 48

TABLE OF CONTENTS

PAGE

IV. THE COURT OF APPEALS SHOULD BE ORDERED TO REINSTATE ITS NOVEMBER 2, 1993 OPINION..... 51

V. THE COURT OF APPEALS SHOULD BE ORDERED TO AMEND ITS NOVEMBER 2, 1993 OPINION TO CONFORM TO THE LAW IN THE AIONA, CITY OF TEMPE, AND OTHER NINTH CIRCUIT CASES..... 52

VI. THE COURT OF APPEALS SHOULD BE ORDERED TO VACATE ITS MAY 4, 1993 MEMORANDUM DECISION AND ITS CONCOMITANT ORDER THAT ITS MEMORANDUM DECISION MAY NOT BE CITED..... 53

VII. THE COURT OF APPEALS SHOULD BE ORDERED TO REMAND THE CASE TO THE UNITED STATES DISTRICT COURT FOR A HEARING ON THE INJUNCTION BOND AND DAMAGES TO THE CITY BY VIRTUE OF THE WRONGFUL INJUNCTION AND THE CITY'S RIGHT AS THE PREVAILING DEFENDANT ON THE HUFFMAN ABSTENTION DOCTRINE TO AN ATTORNEY FEE UNDER 42 U.S.C. SECTION 1988 ON THE GROUND THAT THE FILING WAS IN BAD FAITH, FRIVOLOUS, UNREASONABLE AND WITHOUT FOUNDATION..... 60

CONCLUSION..... 65

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

Aiona v. The Judiciary of the State of Hawaii, 17 F.3d 1994 (CA 9, 1994).....52, 57, 63

Chisholm v. George, 2 U.S. (2 Dall.) 449 (1793).....35

D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983).....2, 53, 55

Ex Parte Young, 209 U.S. 123 (1908)..... 4, 5, 36, 39, 40, 41, 46, 50

Fresh International Corp. v. Agricultural Labor Relations Board, 805 F.2d 1353 (CA 9, 1986).....58, 63

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)..... 1, 3, 14, 15, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 34, 41, 42, 43, 45, 47, 49, 50, 51, 53, 55, 56, 61

Hughes v. Rowe, 448 U.S. 5 (1980).....61

Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423 (1982).....55, 61, 62

Mitchum v. Foster, 407 U.S. 225 (1972)....4, 35, 37, 40, 41

Nevada Entertainment Industries, Inc. v. City of Henderson, 8 F.3d 1348 (1993).....2, 3, 26

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

New Orleans Public Service v. City Council of New Orleans, 491 U.S. 350 (1989).....63, 64, 65

Nintendo of America, Inc. v. Lewis Gallob Toys, Inc., 16 F.3d 1032 (CA 9, 1994).....60

Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986).....63, 65

Partington v. Gedan, 880 F.2d 116 (CA 9, 1989).....58, 63

Partington v. Gedan, 961 F.2d 852 (CA 9, 1992).....59, 63

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1985).....45

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).....2, 53, 55

Stanley v. University of So. Cal., 13 F.3d 1313 (CA 9, 1994).....30, 32

Stratton v. St. Louis Southwestern Railroad Co., 282 U.S. 10 (1930).....9

Watson v. Buck, 313 U.S. 387 (1941).....14

Will v. U.S., 389 U.S. 90.....9

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

World Famous Drinking Emporium v. City of Tempe,
820 F.2d 1079 (CA 9, 1989).....22, 36, 63, 53, 56

Younger v. Harris,
401 U.S. 37 (1971).....20, 41

STATE CASES

Florida Power & Light Co. v. Canal Authority of Florida,
423 So.2d 421 (Fla. Dist. Ct. App. 1982) (see Casad at p. S 1-2.....33, 48

Las Vegas v. Nevada Entertainment, Inc.
772 P.2d 1275 (Nev.S.Ct., 1989)....43, 62

CONSTITUTIONAL PROVISIONS

United States Constitution
Amendments
First.....54
Tenth 27, 29, 44, 46, 54
Eleventh....5, 14, 18, 23, 27, 29, 35, 36, 42, 43, 44, 46, 54
Fourteenth.....54

FEDERAL STATUTES

28 U.S.C.
Section 1651(a)
(All Writs Act).....8, 14, 15

Section 2283
(Anti-Injunction
Statute).....35, 36, 37

TABLE OF AUTHORITIES

PAGE

FEDERAL STATUTES

42 U.S.C.
Section 1983... 3, 5, 7, 9, 29, 31, 34, 35, 40, 41, 49, 61, 64

Section 1988.....60, 61, 64

FEDERAL RULES

U.S. Supreme Court Rules
Rule 11.....1, 9, 34, 11

Federal Rules of Appellate Procedure
Rule 36.....1, 18, 49, 51

Federal Rules of Civil Procedure
Rule 62(c).....13
Rule 65.....29

Rules of the Ninth Circuit
Rule 27-3.....16
Rule 36-2.....18

TEXTS

Casad, Robert; Jurisdiction in Civil Actions, (1983).....33

Redish; Federal Jurisdiction (1980).....35, 36

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PETITION FOR A WRIT OF MANDAMUS (OR CERTIORARI UNDER RULE 11) TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTRODUCTION

The City of Henderson, Nevada, respectfully petitions for a writ of mandamus or writ of certiorari under Rule 11 to the United States Court of

Appeals for the Ninth Circuit and the Honorable James R. Browning, and William C. Canby, Jr., Circuit Judges, and Robert J. Kelleher, Senior District Judge sitting by designation, requiring the Ninth Circuit Court of Appeals to withdraw its May 4, 1994 Memorandum decision as an ultra vires act which is in excess of the Court's subject matter jurisdiction under the Tenth and Eleventh Amendment to the Federal Constitution, and the Huffman abstention doctrine, and the principles stated in the Rooker-Feldman doctrine; and to reinstate the Court's earlier written Opinion and Judgment which was entered on November 2, 1993, in which the Court, after de novo review, filed the Court's written Opinion which was certified for publication as meeting the requirements of FRAP, Rule 36, and Circuit Rule 36-2, and was reported in the advance sheets as Nevada Entertainment Industries, Inc.

v. City of Henderson, 8 F.3d 1348 (CA 9, Nov. 2, 1993) and held in a unanimous opinion that the Huffman abstention doctrine did apply and stated, as its conclusion of law, at page 1353:

> "Conclusion"
> "The decision of the district court refusing to abstain from exercising jurisdiction is REVERSED and the case is REMANDED to the district court with instructions to vacate its judgment and dismiss the complaint."

The City of Henderson contends that, having made the findings of fact that the Nevada Entertainment's Civil Rights complaint (42 U.S.C. Section 1983) was defective in failing to meet the "heightened pleadings of extraordinary circumstances," pursuant to the basic principles of law expressed in Huffman v. Pursue, Ltd., 420 U.S. 592 at 612-613 (1975), the Ninth Circuit Court of Appeals had exhausted its jurisdiction (as well as the U.S. District Court) and thereby lost subject matter jurisdiction

and thereafter (under the Eleventh Amendment challenge by the City of Henderson acting on behalf of the state) could not take any further judicial action in relation to the defective federal complaint, and its April 7, 1994 Order and its May 4, 1994 Memorandum decision were therefore "ultra vires" (void). See and compare Ex parte Young, 209 U.S. 123 (1908), in which the acts of the Attorney General of Minnesota were held to be "ultra vires" and the essential ingredient upon which the 42 U.S.C. Section 1983 federal action was ultimately upheld in Mitchum v. Foster, 407 U.S. 225 (1972), as against an Eleventh Amendment challenge.

Further, the U.S. Court of Appeals and the U.S. District Court are concluded by their relitigation findings on the "fraud" issue, that the quasi-judicial action taken by the City Council on behalf of the State was not

"ultra vires," from which it must be concluded as a matter of law that the complaint itself which is before the Ninth Circuit Court of Appeals does not and cannot (in the light of the States continuing Eleventh Amendment challenge in four years of litigation), be amended to state a valid 42 U.S.C. Section 1983 cause of action, (because of Ex parte Young) and cannot provide a foundation for the Court's judicial action on May 4, 1994.

Since a valid federal civil rights action is not pleaded, the complaint must be dismissed for failure to state a cause of action upon which federal jurisdiction of the subject matter can be based.

This cause is still before the Ninth Circuit Court of Appeals on Petitions for Rehearing filed by both parties. The City of Henderson filed a Petition for Rehearing on May 18, 1994

(see copy at Appendix 7), and Nevada Entertainment has applied for and received an extension of time until June 21, 1994 in which to file a Petition for Rehearing.

Petitioners further requests that this Court shorten the time and require that the Respondents, Court of Appeal for the Ninth Circuit and Nevada Entertainment Industries, Inc. et al., Real Parties in Interest, file a response to this Petition by June 21, 1994, so that this Court may have the opportunity to act upon this Petition prior to the end of the 1993 October Term.

OPINIONS BELOW

A copy of the decisions of the United States District Court, District of Nevada, and the United States Court of Appeals for the Ninth Circuit, as to which petitioner seeks relief, appear at Appendices 1, 2,3, 5, and 6.

JURISDICTION

The decision and final judgment of the United States District Court, District of Nevada, by the Honorable Lloyd D. George, in the Civil Rights Action (42 U.S.C. Section 1983) Nevada Entertainment Industries, Inc. et al., Plaintiffs, v. City of Henderson, et al., Defendants, CV-S-90-264-LDG(LRL), was filed on November 27, 1992. See copy Appendix 1.

The Order of the United States Court of Appeals for the Ninth Circuit (Noonan and T.G. Nelson, Circuit Judges), continuing preliminary injunction pending disposition of appeal, was filed December 22, 1992. See copy at Appendix 2.

The first Opinion of the United States Court of Appeals for the Ninth Circuit which upheld the City's contention that the Huffman abstention doctrine applied in the City's

cross-appeal of the decision and final judgment of the District Court in Nevada Entertainment Industries, Inc. v. City of Henderson et al. was filed November 2, 1993. See copy at Appendix 3.

The Court of Appeals for the Ninth Circuit, by Order dated April 7, 1994, (which the City of Henderson contended is an act in excess of the Court's subject matter jurisdiction), withdrew its Opinion dated November 2, 1993. See copy at Appendix 5.

The Memorandum decision of the Court of Appeals for the Ninth Circuit, (which the City of Henderson contends is an act in excess of the Court's subject matter jurisdiction) was filed on May 4, 1994. See copy of Memorandum Decision at Appendix 6.

The jurisdiction of the United States Supreme Court as to this Petition for a prerogative writ is founded on 28 U.S.C. Section 1651(a), Stratton v. St.

Louis Southwestern Railroad Co., 282 U.S. 10, 16 (1930), and Will v. U.S., 389 U.S. 90, 95.

The jurisdiction of the United States Supreme Court as to the alternative Petition for a Writ of Certiorari is founded on Rule 11 of the United States Supreme Court.

The special and unusual circumstances which warrant exercise by this Court of its discretionary power to issue the writ of mandamus/or certiorari, as requested in this petition, is set forth in detail under the heading, "Reasons for Granting the Writ."

STATUTORY PROVISION INVOLVED

The federal civil rights complaint involved herein was filed under 42 U.S.C. Section 1983.

STATEMENT OF FACTS

Background.

This case has been before this

Court on two (pre-trial) petitions for a writ of certiorari:

City of Henderson, a Nevada Municipal Corp. et al. v. United States District Court, District of Nevada, Nevada Entertainment Industries, Inc., a Nevada corporation and Daniel Bishop, Real Parties in Interest:

(1) in the Supreme Court of the United States, October Term 1990, No. 90-1771, filed on May 16, 1991, and denied on October 7, 1991; and

(2) in the Supreme Court of the United States, October Term 1992, No. 92-643, filed on October 13, 1992, and denied on December 7, 1992. 1/

1/ An additional copy of the petition for writ of certiorari and supplemental brief in No. 92-643 is filed with the Clerk of this Court for purposes of reference in connection with this Petition for Writ of Mandamus.

An application for stay of the trial pending a ruling on the petition for writ of certiorari in No. 90-1771 was made to Justice O'Connor on May 9, 1991 and denied on May 16, 1991. A second application in No. 90-1771 was made to Justice Kennedy who referred the matter to the Court which denied the application on June 10, 1991. An application for stay of the trial pending a ruling on the petition for writ of certiorari in No. 92-693 was made to Justice O'Connor and denied by her on October 27, 1992.

On November 27, 1992, while the petition for writ of certiorari in No. 92-649 was still pending in this Court, the United States District Court filed its Opinion and entered a judgment in CV-5-90-264-LDG (LRL). See Appendix A.

On November 27, 1992, the United States District Court entered an Order and Final Judgment in which the Federal

Court erroneously relitigated the evidence which was before the City Council sitting as a quasi-judicial hearing board for the State of Nevada and rendered judgment in favor of said (quasi-judicial) administrative state board on the stipulated record, lifted the previously issued preliminary injunction, and made the following Findings of Fact and Conclusions of Law at pages 7 and 8 of its Decision:

> "In the present case, plaintiffs attempted to circumvent the City's Code by following a course of deception. Initially, plaintiffs applied for a business license for an adult business. The City then informed the plaintiffs of certain conditions that an adult business had to meet before a license would be authorized. In response to this information, plaintiffs did not seek judicial protection from the City's provisions. Nor did they attempt to meet the conditions for obtaining a license for an adult business. Nor did plaintiffs challenge the law by opening and operating an adult business without obtaining any license.
>
> "Rather, plaintiffs inquired whether a business license would be

> approved for a general business. The City responded that such an application for a general business would be approved. Plaintiffs, fully aware that a license for a general business would be approved whereas an application for an adult business would be rejected, submitted a second application which specifically omitted any reference to an adult business. This second application was approved and, on February 1, 1990, plaintiffs opened an adult business. The City then revoked the plaintiffs' business license, finding that plaintiffs had misrepresented the nature of the business on the license application in order to obtain a license. As permitted by H.M.C. Section 4.04.150, the Council revoked plaintiffs' license for making a false or fraudulent statement in the application for a license."

On November 30, 1992, Defendants ordered Plaintiffs to close their business.

On December 2, 1992, Plaintiffs filed their Notice of Appeal from the Judgment, and also moved the United States District Court for an injunction pending appeal pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.

On December 6, 1992, Defendants

filed a Supplemental Brief with the United States Supreme Court in No. 92-643, calling the United States Supreme Court's attention to the above described Final Judgment and Petitioners' contention that the United States District Court's Findings of Fact and Conclusions of Law in the civil rights action presented a patent Eleventh Amendment conflict and unequivocally established Petitioners' right to immediate relief and dismissal of the federal complaint on the authority of Huffman v. Pursue, Ltd., 420 U.S. 92 (1975), and Watson v. Buck, 313 U.S. 367 (1941), pursuant to a peremptory writ of mandamus under the All Writs Act. Reference: footnote 1 on page 10, supra. See Supplemental Brief at pages 12 - 36.

At the conclusion of the Supplemental Brief, the City argued, at pages 36-37:

"CONCLUSION"

For all of the reasons stated in the Petitions for Writ of Certiorari in Case No. 90-1771, and Case No. 92-643, and the Supplemental Brief herein in Case No. 92-643, Petitioner is entitled to immediate relief either by the issuance of an extraordinary Writ of Mandate under the All Writs Act, vacating the Decision of the United State District Court entered on November 27, 1992, and mandating a dismissal of the federal civil rights action, or by this Court's grant of the Petition for Writ of Certiorari in Case No. 92-643 for resolution of Questions I and IV regarding the jurisdictional issue and the requirement for "heightened pleadings" where a right to relief under Huffman v. Pursue, Ltd. has been validly raised, and a resolution of the additional issue as to whether attorney fees should be granted to a prevailing defendant in a United States District Court Civil Rights Action which has wrongfully been filed by a business corporation whose license had been validly revoked by the City of Henderson because of the fraud which was perpetrated by the corporation in its application for a business license.

On December 7, 1992, the United States Supreme Court denied the Petition for Writ of Certiorari in No. 92-643.

On December 8, 1992, the United States District Court filed an Opinion

in which it denied the Plaintiffs' motion for injunction pending appeal.

On Monday, December 14, 1992, Circuit Judge Noonan filed an order which temporarily stayed the United States District Court's November 25, 1992 Order, which had lifted the June 5, 1991 preliminary injunction against Defendants and set 12 o'clock noon on Friday, December 18, 1992 as the deadline date for a Response to the filing.

On Friday, December 18, 1992, the City filed: (1) its Response [2/] to the Emergency Motion Under Circuit Rule 27-3 for an Injunction Pending Appeal; (2) a Motion for Expedited Appeal; and (3) a

---

2/ A copy of the City's Response is being filed with the Clerk of this Court for purposes of reference in connection with this Petition for Writ of Mandamus.

Motion for Judgment of Dismissal on Grounds of Comity and Lack of Subject Matter Jurisdiction, pursuant to Huffman v. Pursue, Ltd..

On December 22, 1992 the Court of Appeals (Noonan and T.J. Nelson) filed an order: (1) denying the Motion to Dismiss; (2) granting Licensees' Emergency Motion for Injunction Pending Appeal; (3) staying the U.S. District Court November 25, 1992 Order; and (4) expediting the appeal, ordered a detailed brief schedule, and set the matter for argument in San Francisco during the week of April 12 (see Appendix 2 to this Petition).

On December 22, 1992, the City filed its Notice of Cross-Appeal to the U.S. Court of Appeals for the Ninth Circuit from the Trial Judgment entered on November 27, 1992.

On May 10, 1993, the Court of Appeals for the Ninth Circuit heard oral

argument during which the Court stated to the City's counsel of record that it was not interested in hearing argument of the Eleventh Amendment jurisdictional issue.

On November 2, 1993, the Court of Appeals filed an Opinion and certified the same for Publication under Circuit Rule 36-2, in which it reversed the Judge of the United States District Court and held that the Court should have abstained under Huffman v. Pursue, Ltd., as contended by the City in its cross-appeal. (See copy at Appendix 3.)

The Court of Appeals further held in relation to attorney's fees that "The District Court did not abuse its discretion in concluding this was not such a case. Nor do the circumstances justify an award of fees on appeal." The Opinion contained the following conclusion:

"Conclusion"

> "The decision of the district court refusing to abstain from exercising jurisdiction is reversed and the case is remanded to the district court with instructions to vacate its judgment and dismiss the complaint."

On November 30, 1993, Nevada Entertainment Industries, Inc. et al filed a petition for rehearing and suggestion that the Court rehear the matter en banc.

On January 18, 1994, the City of Henderson et al. filed their "Response to the Petition for Rehearing and Suggestion for Hearing en Banc."

On April 7, 1994, the Court of Appeals filed an order reading:

> "The petition for rehearing is granted. The opinion reported at 8 F.3d 1348 (CA 9, 1993) is withdrawn."

On May 4, 1994, the Court of Appeals filed a Memorandum Opinion in which it noted in a footnote on page 1, that the Memorandum was not appropriate for publication and may not be cited to

or by the court of the circuit. Thereafter, the court reexamined the City's quasi-judicial proceedings[3/] and held that the district court's finding of deception by Nevada Entertainment Industries, Inc. et al., applied and was amply supported by the record and affirmed the district court's judgment on that basis, and dismissed the City's cross-appeal that the action should have been dismissed under Younger v. Harris, 401 U.S. 37 (1971) as moot (see copy at Appendix 6). The Court made no ruling on the City's cross- appeal that the City was entitled to attorney fees.

3/ This was clear error. Having held that Huffman applied, the Court lacked "subject matter jurisdiction." There was nothing left for the federal court to adjudicate. The City of Henderson et al. (acting at the direction of the State of Nevada) as a "person" no longer was before the Court. See page 23, infra.

On May 17, 1994, the Court of Appeals filed an order granting Nevada Entertainment Industries, Inc. et al.'s motion for extension of time until June 21, 1994 to file a petition for rehearing.

On May 18, 1994, the City of Henderson filed a Petition for Rehearing as to the Court of Appeals Memorandum of May 4, 1994. See copy at Appendix 7.

STATEMENT OF THE CASE

At the present time a raging conflict exists in the Ninth Circuit Court of Appeals (and other circuits) as to the exact meaning of the Huffman Abstention Doctrine. The conflict is accurately described as "raging" even though the controversy is not readily apparent on the surface from the individual opinions of the Justices themselves and can only be understood through a close examination and analysis of what has taken place in this case and

what is and has been taking place in the twenty years since Huffman v. Pursue, Ltd. was decided. For example, see the short concurring opinion in World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 at 1081 (CA 9, 1989), in which Circuit Judge (now Associate Justice Kennedy) distinguished and accurately defined the Huffman abstention doctrine as "the doctrine of dismissal for lack of jurisdiction pursuant to Huffman v. Pursue, Ltd." -- a distinction and definition which Circuit Judge Tang and a number of the Ninth Circuit Judges will not accept nor do they wish to hear argument upon. The real meaning of Huffman is blurred.

As a result of this "silent treatment" by the Circuit Judges on the issue which is the very "heart" of the Huffman abstention doctrine and the treatment accorded this issue by highly qualified attorneys for the federal

plaintiffs who practice in this area and know the value of maintaining "silence" where challenges are made in support of Justice Kennedy's position (so as not to open "Pandora's Box"), the exact meaning is lost, and constitutional injustices occur in a great number of cases where the dispute clearly belongs in the state court, as here.

This is understandable, because it deals with a "lack of jurisdiction" within the federal system, and there are not many justices on the federal bench who are willing to make or join in an analysis which may limit the "jurisdiction" of the federal bench. As a result, Huffman abstention is not being applied in the manner intended by this Court's opinion in Huffman and the relevant cases.

The application herein is typical -- the Eleventh Amendment violation is patent, yet the Court of Appeals in four

years of litigation has refused to apply the doctrine with its full-meaning so that the confusion which exists as to the nature of the State of Nevada's sovereign rights can be put to rest.

At oral argument the Justices stated they were not interested in argument on the jurisdiction issue. When they issued their opinion in favor of the Huffman abstention doctrine, a decision which the facts absolutely required, and which could not be avoided, the Court crafted its opinion to avoid a discussion on the jurisdiction issue, a tactic which counsel for federal plaintiffs immediately took advantage of. In federal plaintiffs' petition for rehearing now made to the 36 en banc circuit judges on a suggestion for hearing by that body, the federal plaintiffs introduced a number of additional ofbuscating issues which

would not be apposite had the Court stood firm and elaborated on the principles behind Justice Kennedy's doctrine of dismissal for lack of jurisdiction. The foundation for those new arguments was the federal plaintiffs' new argument that the "jurisdiction issue" had been "waived."

Subject matter jurisdiction is never waived -- a maxim which is the very heart of Huffman abstention. However, because the panel of federal circuit judges would not rule on this issue, the Court of Appeals' silence on this matter makes a correct analysis virtually impossible.

In its "Conclusion" at pages 16 et seq. of its Response to the Petition for Rehearing and Suggestion for Rehearing en Banc, filed January 18, 1993, the City made note of the fact that the weaknesses in the November 2, 1993 Opinion invited further obfuscation in

the Ninth Circuit in relation to Huffman abstention cases, and asked the Court to remand the case to the United States District Court for an exercise of that Court's discretion on attorney fees on the ground that the City was the prevailing party on the Huffman issue. See Appendix 4, at pages 16 et seq.:

> "CONCLUSION"
>
> "Appellant City of Henderson is of the view that this Court's three judge panel opinion, reported in 8 F.3d, at 1348-1353, is eminently correct in so far as it has applied the Huffman abstention doctrine to the narrow trial facts which were before the United States District Court.
>
> "The City of Henderson in this regard, however, makes these further contentions:
>
> "(1) The Court's opinion would have greater value to other federal appellate courts and litigants were it to more fully elaborate upon what it meant at page 1350, when it referred to "The considerations relied upon in Huffman." Did the Court mean, as the City of Henderson concluded, that the United States Supreme Court fashioned the Huffman rule (as to civil litigants) for the guidance of federal district courts so as to require them to abstain or require "heightened pleadings" where the pleadings show a strong

probability that the assumption of federal jurisdiction would lead to the type of Tenth and Eleventh Amendment infringement of state powers which occurred herein, as corroborated by the United State District Court's finding of fraud, retrospectively applied?

"(2) The cases cited by Nevada Entertainment and the Amicus Curiae do not affect this Court's opinion in as much as they are not apposite in this Huffman-type appeal which is controlled by an extremely narrow set of facts. Further, their analyses are defective in their apparent failure to weigh in the balance "the considerations relied upon in Huffman." The City of Henderson is of the further view that were this Court's opinion to be expanded to include an elaboration of its language "The considerations relied upon in Huffman," this Court's opinion would materially alter the manner in which the Huffman Doctrine is applied in those cases. It would appear, however, that if such opinion is not expanded, a substantial federal question will be raised which may require resolution by the United States Supreme Court.

"(3) Finally, the City is of the opinion that this Court's opinion requires a remand to the trial court for the exercise of the district court's discretion on the question of attorney's fees, in the light of the entire record (including this Court's opinion that the trial court erred in that the Huffman Doctrine should have been applied), and the City of

> Henderson's claim that, notwithstanding Nevada Entertainment's attorneys had both subjective and objective knowledge from existing case law that the narrow facts of record established a clear case for application of the Huffman Doctrine, they, nevertheless, recklessly continued such litigation by remaining silent and refusing to address the City's arguments on the jurisdictional aspects."

After conference on the plaintiffs expansive obfuscating arguments, which drew in issue its affect on decisions by other panels, the en banc court denied a hearing -- but only after the Ninth Circuit review panel withdrew its opinion!

The City of Henderson, Nevada, contends in its petition for mandamus and writ of certiorari that the Huffman Court never intended or contemplated that Huffman would be applied in such a manner on these facts.

The City's position is clear: once the Huffman doctrine is properly raised by state government as a defense to a

civil federal civil rights complaint requesting an injunction against a pending state quasi-judicial proceeding under 42 U.S.C. Section 1983 (which seeks to limit the "power" of the state judiciary to act in areas which traditionally were barred by the anti-injunction statute and the Tenth and Eleventh Amendments) the federal Court under Huffman is required to determine whether a conflict does and/or may result and if there is, to require the civil rights plaintiffs to amend their complaint for injunction and, by heightened pleadings, make an additional showing of "extraordinary circumstances" if they intend to state a federal cause of action for an injunction under the Civil Rights Act 42 U.S.C. Section 1983. In the latter case, the standard equity test for an injunction under Rule 65 cannot be employed -- as to a Civil Rights lawsuit under 42 U.S.C. Section

1983 on the record below -- a different or "heightened pleading" is required.

In Stanley v. University of So. Cal., 13 F.3d 1313, 1319 (CA9, 1994), the Court described the standard equity test for an injunction in the Ninth Circuit as follows:

> " In Martin v. International Olympic Committee, 740 F.2d 670 (9th Cir. 1984), we described the legal standard a district court must apply in exercising its discretion:
> " 'In this circuit, a party seeking preliminary injunctive relief must meet one of two tests. Under the first, a court may issue a preliminary injunction if it finds that:
> " '(1) the [moving party] will suffer irreparable injury if injunctive relief is not granted, (2) the [moving party] will probably prevail on the merits, (3) in balancing the equities, the [non-moving party] will not be harmed more than [the moving party] is helped by the injunction, and (4) granting the injunction is in the public interest."
> " 'Alternatively, a court may issue a preliminary injunction if the moving party demonstrates either a combination of probable success on the merits and the

> possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor. Under this last part of the alternative test, even if the balance of hardships tips decidedly in favor of the moving party, it must be shown as an irreducible minimum that there is a fair chance of success on the merits. There is one additional factor we must weigh. In cases such as the one before us in which a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo pendente lite, courts should be extremely cautious about issuing a preliminary injunction.'

"Id. at 674-75 (internal quotations and citations omitted) (emphasis in original).

" Coach Stanley argues that she did not seek a mandatory preliminary injunction. She asserts that she was 'not seeking to be instated by USC, she was seeking to continue her employment with USC.' Appellant's Opening Brief at 28. Coach Stanley maintains that she requested a prohibitory preliminary injunction and that the district court erred in applying the test for a mandatory preliminary injunction."

An analysis of Nevada Entertainment's civil rights lawsuit pursuant to 42 U.S.C. Section 1983 is made simple by

the fact that it was a simple equity complaint for an injunction -- it did not allege any claim for damages. The issuance of a preliminary injunction under this "standard" test articulated in Stanley was clearly error. The City contends that this potential error, which is easily avoided at the outset, should and must be corrected by a written opinion in this case. Not to do so only invites further bad decisions by other Courts in Huffman abstention cases.

The form of the complaint is such -- for an injunction -- that if a right to an injunction did not exist under the law, the complaint would have to be dismissed for failure to state a cause of action; that is, the federal court in that instance did not have "subject matter jurisdiction" for such an adjudication. Jurisdiction of the person (i.e. the City of Henderson, acting for

the state) does not occur until after subject matter jurisdiction has been correctly determined. See the discussion on "subject matter jurisdiction," in Jurisdiction in Civil Actions, Robert Casad (copyright 1983), at pages 1-2 through 1-5, and in 1988 Supp. at S 1-2:

> "The concept of subject matter jurisdiction was discussed at some length in Florida Power & Light Co. v. Canal Authority of Florida. [footnote omitted].
>
> '[T]he court must have what could be called potential or inchoate jurisdiction but what is more commonly and properly called "jurisdiction of the subject matter." This is jurisdiction in the abstract and is that sovereign authority, conferred upon a court by constitution, either directly or by authorized statute, to make adjudications, or binding decisions, as to controversies within a certain class of cases or causes. Such subject matter jurisdiction must be properly invoked and perfected. A court's jurisdiction is generally invoked in a given case by a party filing a proper pleading which alleges material facts demonstrating (1) the existence of a judicial controversy (a right in dispute between two or more

> parties) within the subject matter jurisdiction of the court....After the court's jurisdiction has been properly invoked, it is perfected by a proper service of sufficient process on all indispensible parties. This is called acquiring "jurisdiction over the person." [footnote omitted.]'" (Our Emphasis.)

One certain way for this Court to correct this problem in the future is to grant this petition for writ of certiorari under Rule 11, with a view to amend and amplify the Huffman abstention doctrine by holding that the lower court erred, and requiring in the future that where Huffman is pleaded as a defense that federal plaintiffs must amend their pleading (by formal heightened pleadings) under 42 U.S.C. Section 1983 to "allege" the extraordinary circumstances which will "prove" that "subject matter jurisdiction" is present, to avoid the procedural error in this case. The burden of proof in such case is on the federal plaintiff

and was not carried in this case.

The statutory basis and authority for filing the Complaint for Injunction (42 U.S.C. Section 1983) is important where the complaint is brought to enjoin a particular governmental authority or person acting on behalf of the state in a quasi-judicial capacity. As this Court noted in Mitchum v. Foster, 407 U.S. 225, at 231-232 (1972):

> "The anti-injunction statute goes back to the beginnings of our history as a nation. In 1973 Congress enacted a law providing that 'no' writ of injunction be granted (by any federal court) to stay proceedings in any court of a state."

The relief which Nevada Entertainment sought flew in the face of the Anti-Injunction Statute of 1793 and the Eleventh Amemdment [which was enacted 5 years later to correct the United States Supreme Court's 1793 ruling in Chisholm v. George, 2 U.S. (2 Dall.) 449 (1793)]. See Redish, Federal Jurisdiction (1980):

"Tensions in the Allocation of Judicial Power, Chapter 10 "The Anti-Injunction Statute" at page 259-290; and Chapter 11, "Our Federalism" at pages 291-321; and Chapter 6, "State Sovereignty, Immunity and the Eleventh Amendment" at pages 139-140; Section II, "Construction of the Eleventh Amendment: Alternative Theories," setting forth various meaning asserted to the Eleventh Amendment at pages 141-154; and Section III, "The Doctrine of Ex parte Young" at pages 154-159.

The two statutes, 42 U.S.C. Section 1983 and the anti-injunction statute (see 1948 revision at 28 U.S.C. Section 2283) are (silently) at odds with each other in the cross-appeal which is before this Court for resolution. Justice Kennedy's short definition in the City of Tempe case (supra) brings into focus the concepts discussed in Redish's treatise. Although the

decision in Mitchum v. Foster, 401 U.S. 225 (June 19, 1972), specifically held that the civil rights statute was enacted by Congress as an exception to the anti-injunction statute, that decision only heated up the controversy, in as much as the Court in Mitchum pointed out a special caveat (which applies to the Nevada situation which is before the Court) at page 242:

> "Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of section 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights -- to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.' Ex parte Virginia, 100 U.S. at 346, 25 L.Ed. at 679. In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in section 1983 actions, by expressly authorizing a 'suit in equity' as one of the means of redress. And this Court long ago recognized that federal injunctive relief against a state

court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights. Ex parte Young, 209 U.S. 123, 52 L.Ed. 714, 28 S.Ct. 441; cf. Truax v. Raich, 239 U.S. 33, 60 L.Ed. 131, 36 S.Ct. 7; Dombrowski v. Pfister, 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116. For these reasons we conclude that, under the criteria established in our previous decisions construing the anti-injunction statute, section 1983 is an Act of Congress that falls within the 'expressly authorized' exception of that law.

In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding. These principles, in the context of state criminal prosecutions, were canvassed at length last Term in Younger v. Harris, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746, and its companion cases. They are principles that have been emphasized by this Court many times in the past. Fenner v. Boykin, 271 U.S. 240, 70 L.Ed. 927, 46 S.Ct. 492; Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 79 L.Ed. 1322, 55 S.Ct. 678; Beal v. Missouri Pac. R. Co., 312 U.S. 45, 85 L.Ed. 577, 61 S.Ct. 418; Watson v. Buck, 313 U.S. 387, 85 L.Ed. 1416, 61 S.Ct. 962, 136 ALR 1426; Williams v. Miller, 317 U.S 599, 87 L.Ed. 489, 63 S.Ct. 258; Douglas v. City of Jeannette, 319 U.S. 157, 87 L.Ed. 1324, 63 S.Ct. 877; Stefanelli v. Minard, 342 U.S. 117,

> 96 L.Ed. 138, 72 S.Ct. 118; Cameron v. Johnson, 390 U.S. 611, 20 L.Ed. 2d 182, 88 S.Ct. 1335. Today we decide only that the District Court in this case was in error in holding that, because of the anti-injunction statute, it was absolutely without power in this section 1983 action to enjoin a proceeding pending in a state court under any circumstances whatsoever.
>
> "The judgment is reversed and the case is remanded to the District Court for further proceedings consistent with this opinion.
>
> "It is so ordered.
>
> "Mr. Justice Powell and Mr. Justice Rehnquist took no part in the consideration or decision of this case." (Our Emphasis.)

The construction given the federal cause of action (by a 4-3 majority) was predicated upon the fiction of Ex parte Young, 209 U.S. 123 which assumed that the particular government officer [in that case the Attorney General of Minnesota] was acting ultra vires. In the Young case, however, the United States Supreme Court also noted that:

> "It is further objected (and the objection really forms part of the contention that the state cannot be sued) that a court of equity has no jurisdiction to

> enjoin criminal proceedings, by indictment or otherwise, under the state law. This, as a general rule, is true. But there are exceptions. When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal court, the latter court, having first obtained jurisdiction over the subject-matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed. Prout v. Starr, 188 U.S. 537, 542-544. But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court. Taylor v. Taintor, 16 Wll. 366-370; Harkrader v. Wadley, 172 U.S. 148."

Two principles flowing from the above holdings in Mitchum v. Foster and Ex parte Young must be noted which are important to Petitioners' cross-appeal: FIRST if, contrary to that which has been assumed under 42 U.S.C. Section 1983, the fact is shown that the Ex parte Young fiction is untrue, and the acts taken by Petitioners were not ultra vires; then the federal cause of action

for an injunction clearly does not lie. Further, as noted above, the federal court cannot interfere where the proceedings are already pending in the state court: the Younger and Huffman doctrines are addressed as caveats in Mitchum v. Foster and applicable as exceptions to the general 42 U.S.C. Section 1983 rules of law.

It is and has been the City's contention for the four years of this litigation that a correct reading of the law expressed in Mitchum v. Foster, makes it eminently clear that as to the City's cross-appeal:

(1) for a federal judgment that Huffman abstention clearly does apply to this case;

(2) that the federal court did not have subject matter jurisdiction under Ex parte Young and Mitchum v. Foster;

(3) that the injunction was unlawfully imposed in violation of the

Eleventh Amendment;

(4) that the City Council was wrongfully enjoined and is entitled to damages; and

(5) that the cross-appeal is not moot.

REASONS FOR GRANTING THE WRIT OF MANDAMUS (OR CERTIORARI UNDER RULE 11)

The federal complaint and proof adduced below is clearly an unconstitutional collateral attack on an enforceable Nevada state ruling. See Huffman v. Pursue, Ltd., 420 U.S. 592 at 612. Although it is and was argued that the federal plaintiffs' claim of free speech protection provides the "extraordinary circumstances," Plaintiffs provided no proof whatsoever in support of that allegation.

Unless federal plaintiffs are required to allege (by heightened pleadings) the nature of the

"extraordinary circumstances" and prove those allegations, cases will rarely be properly adjudicated.

At the time they filed their federal complaint, Plaintiffs' knew, as to any state court action and their pleading and proof, they would be concluded by the City of Las Vegas case [Las Vegas v. Nevada Entertainment, Inc., 772 P.2d 1275 (Nev.S.Ct., 1989)]. To avoid that result, they fraudulently brought this federal action as a collateral attack on the rule established in City of Las Vegas. Huffman is an absolute bar, especially here, where there was a pending state proceeding. To hold otherwise would instruct all litigants on "how" to thumb their noses at the Eleventh Amendment and avoid the rule of law expressed in Huffman.

I

THE CITY OF HENDERSON'S "HUFFMAN" CHALLENGE BEFORE THE FEDERAL COURT INVOKED FOUR BASIC JURISDICTIONAL PRINCIPLES OF LAW WHICH ARE NEVER WAIVED.

The City of Henderson et al.'s "Huffman" challenged before the federal court invoked four basic jurisdictional principles of law which are never waived:

(1) lack of federal (subject matter) jurisdiction;

(2) failure to state a claim ("subject matter") upon which relief can be based;

(3) state sovereignty - police power (Tenth Amendment); and

(4) right to be sued only in state court (Eleventh Amendment);

All four principles were violated by the Court of Appeals' decision of May 4, 1994. The federal plaintiffs have the burden of proof and must plead and prove the Huffman exception for federal

(subject matter) jurisdiction.

This court should resolve the issue of how to measure the federal plaintiffs' burden of proof under Huffman v. Pursue, Ltd. 420 U.S. 592 to meet the jurisdictional requirement of proving "extraordinary circumstances where the danger of irreparable loss is both great and immediate." At a minimum, before subjecting federal civil rights defendants to a trial under the instant circumstances, the federal court must first find, under its "jurisdiction to determine jurisdiction" function, the requisite "extraordinary circumstances where the danger of irreparable loss is both great and immediate," pursuant to this Court's ruling in Huffman v. Pursue, Ltd., supra at 612, as authoritatively construed by this Court the previous year in Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 at 14-17 (1985).

Further, federal jurisdiction in such cases is dependent upon the "fiction" created in Ex Parte Young that the Attorney-General or state agent (here a municipality) is violating the constitution and, thus, the lawsuit is against a private individual rather than against the state in violation of the Eleventh Amendment. When the federal court entered its judgment that the City of Henderson had acted properly in revoking federal plaintiffs' business license (for fraud) [and thus, the state administrative action could not be invalidated based upon any showing of federal constitutional violations], the "fiction" of Ex Parte Young was dispelled and the jurisdiction of the federal court was exhausted. At that point, the federal court was under the constraints imposed by the Tenth and Eleventh Amendments and had no power to "stay" its lack of jurisdiction and was

required to dismiss the lawsuit.

II

THE JURISDICTION ISSUE WAS NOT MOOT

The Court of Appeals in its May 4, 1994 Memorandum incorrectely held that in light of its disposition of the case (on the merits), the Huffman jurisdictional issue would be an "advisory opinion" and had therefore become "moot." Under Huffman, the Court of Appeals can never get to the issue of the merits. It is elementary that the issue of whether the Court had subject matter jurisdiction to act on the merits must be decided first, before the court acts in relation to the merits. This question does not become "moot" simply because the federal court feels that, for some unexplained reason, it would rather get to the merits and dismiss the case on that basis. As noted above at pages 33-34, in relation to the explanation of subject matter jurisdiction

found in Florida Power & Light Co., 423 So.2d 421 (Fla.Dist.Ct.App. 1982), supra at page 33, once the Court of Appeals decided the fundamental Huffman issue as to "subject matter jurisdiction," that is, that the federal court did not have subject matter jurisdiction because of the Eleventh Amendment, the "person" of the State of Nevada and the City of Henderson et al. was no longer before the federal court.

III

THE COURT OF APPEALS SHOULD BE ORDERED TO WITHDRAW ITS MAY 4, 1994 MEMORANDUM AS A DECISION WHICH IS ULTRA VIRES, BEING IN EXCESS OF THE COURT'S "SUBJECT MATTER JURISDICTION."

The Court of Appeals should be ordered to withdraw to withdraw its May 4, 1994 Memorandum as a decision which is ultra vires, being in excess of the Court's "subject matter jurisdiction" for the following reasons: (1) Having made findings of fact and conclusions of law in its Opinion and entered its Judgment on November 2, 1994 pursuant to

the Federal Rules of Appellate Procedure, Rule 36, that Huffman v. Pursue, Ltd. abstention does apply, the Court of Appeals exhausted its jurisdiction, and by operation of law and the principles of law expressed by Chief Justice Rhenquist in Huffman v. Pursue, Ltd. 420 U.S. 592 at 612-613, and the Federal Rules of Appellate Procedure, Rule 36, has ousted the federal court system, including itself, of "subject matter jurisdiction" (the "person" of the City of Henderson, acting for the State of Nevada, is no longer properly before the federal court) and, the Court thereafter, lacked the "power" to rule further in relation to the defective pleading; (2) Nevada Entertainment's federal complaint fails to plead a federal civil rights cause of action pursuant to 42 U.S.C. Section 1983 and is fatally defective in its failure to allege and prove by

"heightened pleadings" the requisite extraordinary circumstances which would cure the defect and take the case outside the Huffman rule re "subject matter" jurisdiction); (3) the fact that the Court on April 7, 1994, attempted to withdraw its November 2, 1993 findings of fact and conclusions of law, and Judgment, without expressing the reason therefore, is immaterial. The Court's April 7th action is also "ultra vires" for the same reason and the November 2, 1993 findings of fact and conclusions of law, and judgment entered on that date, remain uncontroverted (the "person" of the City of Henderson et al. acting for the State of Nevada was no longer properly before the federal court on April 7, 1994). Compare the acts of the Minnesota Attorney General in Ex parte Young, 209 U.S. 123 (1908).

IV

THE COURT OF APPEALS SHOULD BE ORDERED TO REINSTATE ITS NOVEMBER 2, 1993 OPINION.

The Court of Appeals should be ordered to reinstate its November 2, 1994 opinion (which was certified as suitable for publication) and judgment entered thereon on November 2, 1993 pursuant to the Federal Rules of Appellate Procedure, Rule 36, and arbitrarily withdrawn on April 7, 1994 (without any explanation of the reasons for such withdrawal and their refusal to address the City's jurisdictional challenge which is validated by Justice Kennedy's dissent). That Opinion and Judgment holds that Huffman v. Pursue, Ltd. abstention is controlling precedent under the three part test established by the United States Supreme Court.

V

THE COURT OF APPEALS SHOULD BE ORDERED TO AMEND ITS NOVEMBER 2, 1993 OPINION TO CONFORM TO THE LAW IN THE AIONA, CITY OF TEMPE, AND OTHER NINTH CIRCUIT CASES.

The Court of Appeals should be ordered to amend its November 2, 1993 opinion to incorporate the additional language of the Ninth Circuit Court of Appeal in Aiona v. The Judiciary of the State of Hawaii, 17 F.3d 1994 at 1248 and 1250, fn. 10, decided four months later (March 3, 1994) which provides an answer to the "lack of jurisdiction" issue raised by the City in its cross-appeal, which issue was not discussed in the Court's November 2, 1993 opinion, and as to which the Court announced at oral argument on May 10, 1993 that it did not want to hear argumentation thereon, namely: "a district court must dismiss the federal action ... and there is no discretion to grant injunctive relief" because, for

the reasons stated in the Rooker-Feldman doctrine, and as noted by Associate Justice Kennedy in his concurring opinion in the City of Tempe case, supra, at page 1081, the federal court (both the U.S. District Court and the Court of Appeals) lack "subject matter jurisdiction" to review the City Council quasi-judicial findings of "fraud" (and therefore, the "person" of the City of Henderson et al. acting for the State of Nevada is not properly before the federal court) in either ongoing quasi-judicial proceedings (Huffman) or by collaterally attacking final state judgments (Rooker-Feldman, infra).

VI

THE COURT OF APPEALS SHOULD BE ORDERED TO VACATE ITS MAY 4, 1994 MEMORANDUM DECISION AND ITS CONCOMITANT ORDER THAT ITS MEMORANDUM DECISION MAY NOT BE CITED.

The Court of Appeals should be ordered to vacate its May 4, 1994 Memorandum decision, and its concomitant

order that such May 4, 1994 decision may not be cited as precedent, on the ground that such federal court rulings are arbitrary and capricious and in derogation of the fundamental common law principles which underlie the determination of: "precedent," the judicial construction and interpretation which must be given to the First, Tenth, Eleventh and Fourteenth Amendments to the U.S. Constitution; and the settlement of the many raging legal controversies (including the "lack of jurisdiction" controversy in the City's cross-appeal) which daily confront the three members of this Court and the 35 other judges now sitting on the en Banc Ninth Circuit Court of Appeals.

The publication and filing of the May 4, 1994 Memorandum decision is an ultra vires act which is in excess of the Court of Appeals' <u>subject matter jurisdiction</u> and in derogation of the

"subject matter jurisdiction" Rule of Law established by the United States Supreme Court in its Huffman-Middlesex abstention doctrine, infra, and the long standing Rooker-Feldman doctrine. The Court of Appeals deliberate review of the "merits" of the Henderson City Council's quasi-judicial finding of "fraud" in an on going Nevada State license revocation proceedings at this (late) stage of the litigation and long after the injunction (harm) and constitutional wrong had been inflicted, for an ulterior motive, such as avoiding the need to address the jurisdiction Rule of Law mandated by the United States Supreme Court's Huffman-Middlesex abstention which is the central issue in four years of litigation and the primary issue before the Court of Appeals on the City's cross-appeal, flies in the face of, and stands as a mockery of the

jurisdictional rule of law established by the United States Supreme Court in Huffman abstention litigation which precludes any federal jurisdiciton to rule in relation to any state case, wherein the Huffman abstention doctrine applies, because the "person" of the City of Henderson et al. acting for the State of Nevada is no longer properly before the federal court.

The May 4, 1994 Memorandum Decision, in refusing to address the "lack of jurisdiction" issue, is in direct conflict with the decisions of other Ninth Circuit judges in Huffman abstention cases; who have experienced no such reluctance in articulating the "lack of jurisdiction" concept. [See World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 at 1081 (CA 9, 1989) (Kennedy concurring opinion):

KENNEDY, Circuit Judge, concurring:

> "General principles of abstention are distinct from the doctrine of dismissal for lack of jurisdiction pursuant to Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200 (1975). Only the latter rule is applicable here, and Huffman squarely controls. I concur in the judgment." (Our Emphasis.)

Aiona v. The Judiciary of the State of Hawaii, 17 F.3d 1244 (Poole, Wiggins, T.G. Nelson) at 1248:

> "If these three circumstances exist, then 'a district court must dismiss the federal action ... [and] there is no discretion to grant injunctive relief.' Fresh Int'l Corp., 805 F.2d at 1356 (citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 816 n. 22, 96 S.Ct. 1236, 1245, 47 L.Ed.2d 483 (1976))." (Our Emphasis.)

and 17 F.3d at 1250, fn. 10 (CA 9, 1994):

> "Any possible plaintiffs either would have license revocation proceedings pending in state court, in which case Younger abstention applies, or would be collaterally attacking final state judgments, in which case the Rooker-Feldman doctrine applies. See MacKay v. Pfeil, 827 F.2d 540, 543-45 (9th

Cir. 1987)." (Our Emphasis.)

Fresh International Corp. v. Agricultural Labor Relations Board, 805 F.2d 1353 (Schroeder and Fletcher, U.S. Circuit Judges; Rosenblatt, U.S. Dist. Court Judge), at 1356, fn. 2 (CA 9, 1986):

> "....Although the abuse of discretion standard may be appropriate for other forms of abstention because they involve the discretionary exercise of a court's equity powers, [citations omitted], application of the Younger abstention doctrine is absolute. Because a district court has no discretion to issue injunctive relief in the Younger context, Colorado River Water Conservation District v. United States, 424 U.S. at 816 n. 22, 96 S.Ct. at 1246 n. 22, the abuse of discretion standard is inappropriate." (Our Emphasis.)

Partington v. Gedan, 880 F.2d at 116, at 129 (CA 9, 1989):

> "... such an attack on State v. Clarke implicates the Rooker-Feldman doctrine forbidding lower federal courts to sit in direct review of state court judgments. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482-86, 103 S.Ct. 1303, 1314-16, 75 L.Ed.2d 206 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16, 44 S.Ct. 149, 150, 68 L.Ed.

362 (1923); see also MacKay v. Pfeil, 827 F.2d 540, 543-45 (9th Cir. 1987) (per curiam); Worldwide Church of God v. McNair, 805 F.2d 888, 890-93 (9th Cir. 1986) (Worldwide Church of God)."

Partington v. Gedan, 961 F.2d 852, at 864 (CA 9, 1992):

"4. Claims 2 & 7."

"The district court dismissed Claim 2 and Claim 7 on the ground that it had no jurisdiction under the Rooker-Feldman doctrine and the Eleventh Amendment to grant the relief requested. (Our Emphasis.)

"....

"....although the plaintiff could challenge the constitutionality of the state-court rule in federal court, he could not challenge state-court decisions in particular cases arising our of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." Id., at 486, 103 S.Ct. at 1317 (emphasis added); accord Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923). Under the "Rooker-Feldman doctrine," review of state court decision may only be conducted in the United States Supreme Court. Lower federal courts may not review such decisions." (Our Emphasis.)

VII

THE COURT OF APPEALS SHOULD BE ORDERED TO REMAND THE CASE TO THE UNITED STATES DISTRICT COURT FOR A HEARING ON THE INJUNCTION BOND AND DAMAGES TO THE CITY BY VIRTUE OF THE WRONGFUL INJUNCTION AND THE CITY'S RIGHT AS THE PREVAILING DEFENDANT ON THE HUFFMAN ABSTENTION DOCTRINE TO AN ATTORNEY FEE UNDER 42 U.S.C. SECTION 1988 ON THE GROUND THAT THE FILING WAS IN BAD FAITH, FRIVOLOUS, UNREASONABLE AND WITHOUT FOUNDATION.

The Court of Appeal should be ordered to remand the case to the U.S. District Court for:

(a) a further hearing on the $20,000 injunction indemnification bond and the damages to the City of Henderson arising out of the Eleventh Amendment injury and wrongful injunction of four years duration [see Nintendo of America, Inc. v. Lewis Gallob Toys, Inc., 16 F.3d 1032 at 1036 (CA 9, Feb. 17, 1994)] which has prevented the City from enforcing the City Council's quasi-judicial law enforcement Order which revoked Nevada Entertainment's right to operate in the City of

Henderson as an adult business; and

(b) a determination as to whether the City of Henderson is entitled to an award of an attorney fee at trial and on appeal under 42 U.S.C. Section 1988, as the prevailing defendant on the Huffman-Middlesex abstention doctrine issue under the test proscribed in Hughes v. Rowe, 448 U.S. 5, 14, 101 S.Ct. 173, 178, 66 L.Ed.2d 163 at 198 (per curiam) and the City's claims that Nevada Entertainment filed the 42 U.S.C. Section 1983 Civil Rights Action in the federal court during the stay period and while the license revocation determination was an issue which was still pending in the state court system:

(1) in subjective and objective "bad faith," as those terms are used in determining attorney fees under the Common Law rule and 42 U.S.C. Section 1988;

(2) with a fraudulent intent,

to avoid an adverse decision in the Nevada Supreme Court which was certain to result in a state appeal from the City Council's quasi-judicial finding of "fraud" under the prevailing state law precedent which considered the identical problem in the fraudulent procurement of a business license issued pursuant to Nevada state law in City of Las Vegas v. Nevada Industries, Inc., 772 P.2d 1275 (Nev. S.Ct. 1989); and

(3) with the full knowledge of its attorneys, who had a substantial practice in this area of the law, and were well schooled on "civil rights" and "abstention" issues and had a working knowledge of the legal effect of the U.S. Supreme Court precedents in Huffman v. Pursue, Ltd., supra, Middlesex Ethics Commission v. Garden State Bar Exam, 457 U.S. 423, 432 (1982), Ohio Civil Rights

Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986), and New Orleans Public Sev. Inc. (NOPSI) v. City Council of New Orleans, 491 U.S. 350, 369 (1989), and Ninth Circuit cases [World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 at 1081 (CA 9, 1989) (Kennedy concurring opinion); Aiona v. The Judiciary of the State of Hawaii, 17 F.3d 1244 at 1248 and 1250, fn. 10 (CA 9, 1994); Fresh International Corp. v. Agricultural Labor Relations Board, 805 F.2d at 1353, at 1356, fn. 2 (CA 9, 1986); Partington v. Gedan, 880 F.2d at 116, at 120 (CA 9, 1989); Partington v. Gedan, 961 F.2d 852, at 864 (CA 9, 1992)], and their decision to file the civil rights lawsuit in the federal court rather than in the state court, as is allowed under the Nevada judicial procedure (where "subject matter jurisdiction" would not have presented an issue as in this case) was

for the purpose of "testing the waters," and was frivolous, unreasonable, and without foundation as those terms are used in 42 U.S.C. Section 1988.

Further, federal plaintiffs, Nevada Entertainment Industries, Inc. et al., are well aware of the fact that had they prevailed in the Civil Rights lawsuit (42 U.S.C. Section 1983), they would, as the prevailing plaintiff, have been entitled to, and would have been awarded an attorney fee, and, must be held to have assumed the mutual risk of paying attorneys fees to the City in this case for their wrongful election to file the federal complaint and their failure to prevail on the issue which the United States Supreme Court had previously decided against them. The erroneous claim of amicus curiae, speaking on behalf of federal plaintiffs, that footnote 4 in New Orleans Public Service, Inc. v. Council of New Orleans,

491 U.S. 350, at 369, 109 S.Ct. 2506 (1989) made the Dayton case "dictum" is a factor which confirms the necessity of the issuance of a writ of mandamus in this case so that such misconception may be put to rest.

CONCLUSION

The petition for a writ of mandamus, or writ of certiorari under Rule 11, should be granted.

Dated: June 2, 1994

Respectfully submitted,

James J. Clancy
Counsel of Record
For Petitioners

APPENDIX 1

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA IN NEVADA ENTERTAINMENT INDUSTRIES, INC., ET AL. v. CITY OF HENDERSON, ET AL., NO. CV-90-00264-LDG (LRL), ENTERED NOVEMBER 27, 1992.

[Reference: Petition at page 6, 7, 11, and 17].

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES, INC., et al., Plaintiffs, v. CITY OF HENDERSON, et al., Defendants.	CV-S-90-264-LDG (LRL) DECISION [ENTERED NOV. 27, 1992 Clerk, U.S. Dist. of Nevada By _____Deputy]

The parties have submitted this matter for trial on the briefs. Plaintiffs seek a declaratory judgment that certain ordinances of the City of Henderson are unconstitutional and seek to enjoin enforcement of the ordinances.

Facts

On April 4, 1989, the City of Henderson enacted a new Zoning Code. Among its provisions, the Zoning Code limited the operation of adult businesses to a newly defined Commercial-Highway ("CH") zone. In implementing the Zoning Code, the City

roughly adapted its old zoning map but failed to create any CH zones. Further, the City failed to designate any CH zones until it adopted a new zoning map on December 4, 1989.

In the interim, plaintiffs applied for a business license to operate an adult business. In response to this application, plaintiffs were informed that an adult business could only be operated in a CH zone, that no CH zone existed, that they would have to obtain a zone change or variance, and that they would have to obtain a conditional use permit. Plaintiffs were also informed that, until they had met these conditions, their business license would not be authorized.

Plaintiffs' subsequently filed a new application for a license to operate a general business, omitting any reference to the adult nature of the business. The City approved this

second application in September. On February 1, 1990, plaintiffs opened an adult business. The City immediately commenced a revocation proceeding. In April, the City found that plaintiffs misrepresented the nature of their business on the application and revoked the license. Plaintiffs brought this action to stay the revocation, arguing that the various city ordinances are unconstitutional.

Lack of Jurisdiction

As an initial matter, the court notes that, contrary to the arguments of the City, the Younger abstention doctrine does not divest this court of jurisdiction. This doctrine "does not arise from lack of jurisdiction in the District Court, but from strong policies counseling against the exercise of such jurisdiction where particular kinds of state proceedings have already been commenced." Ohio

Civ. Rights Com'n v. Dayton Christian Schools, 477 U.S. 619, 626 (1986). The issue properly raised by Younger abstention is not whether this court lacks jurisdiction, but whether it should abstain from exercising its jurisdiction.

Abstention

This court is mindful of the principle that "abstention from the exercise of federal jurisdiction is the exception, not the rule." Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976). Federal courts are especially reluctant to abstain when First Amendment issues are involved. Baggett v. Bullitt, 377 U.S. 360, 379 (1964); Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 532 (9th Cir. 1984), rev'd on other grounds, 475 U.S. 14 (1986).

Previously, the City argued that

its action for declaratory judgment, brought in state court, compelled abstention. The City brought its state court suit four months after this court had entered a preliminary injunction in this federal action. "Younger abstention is required, however, only when state court proceedings are initiated 'before any proceedings of substance on the merits have taken place.' Hicks v. Miranda, [422 U.S. 332, 349 (1975)]. In other cases, federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them." Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 238 (1984). This court affirms its prior ruling that the state court proceeding brought by the City did not compel abstention.

The City now argues that abstention is compelled by the City Council hearing and decision which

revoked plaintiffs' business license. This revocation proceeding, the City asserts, remains pending for Younger purposes. The City argues that "[s}tate proceedings...for which the state offers statutory appellate review through its courts or otherwise, are pending for Younger purposes from the time it is [sic] initiated, until it has [sic] completed the review process."

This court is not persuaded that the revocation proceedings remain pending for purposes of abstention. Not only must the state offer judicial review, but this review must permit review of the constitutional issues raised by the proceeding. The vital consideration guiding a determination of Younger abstention is comity: the federal government's proper respect for legitimate activities of state government. Huffman v. Pursue, Ltd.,

420 U.S. 592, 601 (1975).

Abstention accords the state judiciary the opportunity to oversee constitutional issues arising in litigation over which it has jurisdiction. Id., 420 U.S. at 609. Thus, "it is sufficient...that constitutional claims may be raised in state-court judicial review of the administrative proceeding." Ohio Civ. Rights Com'n v. Dayton Christian Schools, 477 U.S. 619, 629 (1986). Conversely, a proceeding which does not permit judicial review of constitutional claims is insufficient to compel abstention.

Although the City provides for judicial review of City Council determinations, this review is extremely limited. Pursuant to Henderson Municipal Code ("H.M.C.") Section 4.06.160, decisions of the City Council regarding business licenses may

be appealed to the state district court. This appeal is limited to a "judicial review of questions of law." This limited review is further narrowed to "the specific rulings on questions of law which the petition contends constitutes error." H.M.C. Section 4.06.160(a). Under this provision, petitioners can only appeal those questions of law for which the City Council has made a specific ruling. By not ruling on a constitutional issue, the City Council can preclude judicial review of that constitutional claim.

This is exemplified by the present case. Plaintiffs attempted to raise constitutional issues at the revocation hearing, although the City Council did not address any of these issues. At one point, Mayor Kesterson stated "I'm not trying the Constitution here and don't want to go into all that. We have a set case here that we are trying to

follow." Verbatim Transcript of License Revocation Hearing Held Before the City Council of Henderson ("V.T."), at 88 (April 10, 1990). Later, in apparent reference to the constitutional issues raised, Councilmember Williams remarked, "I really think that as far as we are concerned, some of [the] things that have been brought up are not in our prerogative to decide." V.T. at 244.

The City's order revoking plaintiffs' license reflects Mayor Kesterson's assertion that constitutional issues would not be decided. The specific rulings are expressly limited to believability of witnesses, the adult nature of the plaintiffs' business, and the finding that plaintiffs' misrepresented the nature of the business in obtaining a license. Since the City failed to make specific rulings on plaintiffs' constitutional questions, plaintiffs

are precluded from seeking judicial review of their constitutional claims. The lack of opportunity for plaintiffs' to pursue judicial review of constitutional claims indicates that the City Council hearing was not a pending state action for purposes of Younger abstention. Accordingly, because a state action was not pending when substantial proceedings occurred in this federal action, abstention is inappropriate.

Plaintiffs' Constitutional Challenge

Plaintiffs argue that the various provisions of the Henderson Municipal Code, as they existed when plaintiffs applied for a business license, were unconstitutional.[1] Without any support,

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[1] The Court is disturbed by the failure of both parties to cite any authority on the fundamental and critical issue of whether plaintiffs' (Footnote Continued)

plaintiffs contend that, since the regulatory scheme was invalid, the statements they made on their license application are immaterial. This court disagrees.

Until the City Council hearing, plaintiffs had not sought to challenge the constitutionality of the provisions of the Henderson Municipal Code.

(Footnote Continued)
fraudulent application precluded a constitutional challenge of the underlying law. Plaintiffs contend the fraudulent statements are immaterial, but fail to offer any argument, or law, distinguishing the contrary controlling law.

Equally distressing, however, is that the City's counsel failed to properly identify the issue or to cite the readily available controlling law. At most, counsel made an unnecessarily circuitous argument that the fraudulent application precluded a federal challenge because "none of [the] ordinances were given an opportunity to be construed by the City and state court judiciary." This cursory argument is not only incorrect, but it ignores the opinions of the Supreme Court holding that plaintiffs cannot raise any constitutional challenge of a law that they have attempted to avoid by deception.

Rather, they attempted to circumvent the City's Code by filing a second, misleading application. A plaintiff may challenge a regulatory scheme without first submitting to the unconstitutional law. Shuttlesworth v. Birmingham, 394 U.S. 147, 151 (1969); Fernandes v. Limmer, 663 F.2d 619, 625 (5th Cir. 1981). However, a plaintiff may not

> invoke the process of the court to obtain a ruling on an issue that he practiced deception to avoid. 'When one undertakes to . . . mislead [government officials] by false statements, he has no standing to assert that the operations of the Government in which the effort to . . . mislead is made are without constitutional sanction.'

Acanfora v. Board of Educ., 491 F.2d 498 (4th Cir. 1974), citing Kay v. United States, 303 U.S. 1, 6 (1938). In Dennis v. United States, 384 U.S. 855 (1966), the Court reiterated that a plaintiff who practices a course of fraud and falsehood in an attempt to circumvent a law, may not challenge the

constitutionality of the law when the deception is discovered. Whether a provision is constitutional or not is legally irrelevant to the validity of a finding that deception was used to avoid application of the law. Bryson v. United States, 396 U.S. 64, 68 (1969).

In the present case, plaintffs attempted to circumvent the City's Code by following a course of deception. Initially, plaintiffs applied for a business license for an adult business. The City then informed the plaintiffs of certain conditions that an adult business had to meet before a license would be authorized. In response to this information, plaintiffs did not seek judicial protection from the City's provisions. Nor did they attempt to meet the conditions for obtaining a license for an adult business. Nor did plaintiffs challenge

the law by opening and operating an adult business without obtaining any license.

Rather, plaintiffs inquired whether a business license would be approved for a general business. The City responded that such an application for a general business would be approved. Plaintiffs, fully aware that a license for a general business would be approved whereas an application for an adult business would be rejected, submitted a second application which specifically omitted any reference to an adult business. This second application was approved and, on February 1, 1990, plaintiffs opened an adult business. The City then revoked the plaintiffs' business license, finding that plaintiffs had misrepresented the nature of the business on the license application in order to obtain a license. As

permitted by H.M.C. section 4.04.150, the Council revoked plaintiffs' license for making a false or fraudulent statement in the application for a license.

It is evident that plaintiffs attempted to avoid the City's zoning and licensing regulations through deception. Accordingly, plaintiffs cannot attack the revocation of their license, which was based upon the discovery of their deception, by challenging the constitutionality of the underlying law.

This decision shall constitute the findings of fact and conclusions of law. Judgment will be entered accordingly.

DATED this 25th day of November, 1992.

LLOYD D. GEORGE
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES, INC., et al., Plaintiffs, v. CITY OF HENDERSON, et al., Defendants.	CV-S-90-264-LDG (LRL) JUDGMENT [ENTERED NOV. 27, 1992 Clerk, U.S. Dist. of Nevada By _____Deputy]

Judgment is hereby entered in favor of Defendants City of Henderson and James Goff, Chief of Police of the City of Henderson, and against Plaintiffs Nevada Entertainment Industries, Inc., and Daniel Bishop. The preliminary injunction entered by this court on June 5, 1990, is lifted. Pursuant to 42 U.S.C. Section 1988, the court may, in its discretion, award attorney's fees to the prevailing party. It is the court's determination that, although Defendants prevailed, their defense does not warrant an award of attorney's fees. Pursuant to Local

Rule 205, Defendants shall file a bill of costs and disbursements with the clerk.

DATED this 25th day of November 1992.

_____

LLOYD D. GEORGE
United States District Judge

APPENDIX 2

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN NEVADA ENTERTAINMENT INDUSTRIES, INC., ET AL. v. CITY OF HENDERSON, ET AL., NO. 92- 17054 [DC # CV-90-00264-LDG Nevada (Las Vegas)], FILED DECEMBER 22, 1992.

[Reference: Petition at page 6, 7, and 17].

[Filed Dec. 22, 1992;
Catterson, Clerk,
Court of Appeals]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation, et al., Plaintiffs-Appellants, vs. CITY OF HENDERSON, a Nevada municipal corporation, et al., Defendants-Appellees.	No. 92-17054 DC # CV-90-00264-LDG Nevada (Las Vegas) ORDER

Before: NOONAN and T.G. NELSON, Circuit Judges

Appellees' motion to dismiss the appeal for lack of jurisdiction is denied. Appellants' emergency motion for an injunction pending appeal is granted. The district court's November 25, 1992 order is stayed and the district court's June 5, 1990 preliminary injunction against appellees

shall remain in effect pending disposition of this appeal.

The appeal shall be expedited as follows. Appellants shall secure the filing of the certificate of record by January 11, 1993. Appellants' opening brief is due January 25, 1993. Appellees' response brief is due February 22, 1993. Appellants' optional reply brief, if any, is due March 1, 1993.

Absent extraordinary circumstances, no extensions of time for filing of the briefs will be entertained by the court. All subsequent filings in this matter shall be served on the court and on all parties by hand delivery or by overnight delivery service. The Clerk shall set this matter for argument in San Francisco during the week of April 12, 1993.

MoCal 12/21/92

APPENDIX 3

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN NEVADA ENTERTAINMENT INDUSTRIES, INC., ET AL. v. CITY OF HENDERSON, ET AL., NO. 92-17054/ 93-15052 [DC # CV-90-00264-LDG Nevada (Las Vegas)], FILED NOVEMBER 2, 1993.

[Reference: Petition at page 2, 6, 8, 18, and 51].

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada Corporation; DANIEL BISHOP,
Plaintiffs-Appellants-Cross-Appellees,

v.

CITY OF HENDERSON, a Nevada Municipal Corporation; JAMES GOFF, Chief of Police and the City of Henderson,
Defendants-Appellees-Cross-Appellants.

Nos. 92-17054
93-15052

D.C. No.
CV-90-00264-LDG

OPINION

Appeal from the United States District Court
for the District of Nevada
Lloyd D. George, District Judge, Presiding

Argued and Submitted
May 10, 1993—San Francisco, California

Filed November 2, 1993

Before: James R. Browning and William C. Canby, Jr., Circuit Judges, Robert J. Kelleher,* Senior District Judge.

Per Curiam

*The Honorable Robert J. Kelleher, Senior Judge, United States District Court for the Central District of California, sitting by designation.

SUMMARY

Civil Litigation and Procedure/Jurisdiction/Administrative Law

The court of appeals reversed a district court decision and remanded. The court held that the district court was required to abstain from exercising jurisdiction over a plaintiff's claim challenging the constitutionality of a zoning ordinance when the plaintiff had not sought review in state court of a City Council order revoking its business license.

Appellant Nevada Entertainment Industries, Inc. applied for a license to operate an adult video store in Henderson, Nevada. Appellee City of Henderson's zoning ordinance limited such businesses to certain zones, of which it contained none. After Nevada Entertainment applied for and was issued a license to operate a general video store, it opened an adult video store. The City commenced a proceeding to revoke Nevada Entertainment's license. The City Council issued an order revoking the license.

Rather than appealing the order to the state district court, Nevada Entertainment filed suit in federal court, challenging the constitutionality of the city's zoning ordinances. The City argued that the district court was required to abstain under *Younger v. Harris*, 401 U.S. 37 (1971), which requires abstention when state proceedings, judicial in nature, (1) are pending, (2) involve important state interests, and (3) afford an adequate opportunity to raise the constitutional issue. The district court rejected the abstention claim, but granted judgment for the City. Nevada Entertainment appealed. The City cross-appealed the court's refusal to abstain.

[1] The considerations relied upon by the Supreme Court in an earlier case, supporting the requirement that state appellate review of a state court judgment be exhausted before federal court intervention is permitted, apply equally to state judicial

review of the decision in a state administrative proceeding, which is judicial in nature. [2] Moreover, it is consistent with *Younger* for a federal court to abstain from intervening where an administrative proceeding has been initiated by the state to enforce state law even if those proceedings have concluded, when adequate state judicial review was available to the federal plaintiff. Because the administrative proceeding in this case was coercive and brought by the state to enforce its laws, *Younger* required the federal court to abstain from intervening unless and until that proceeding, including review by the state court, was complete. Since Nevada Entertainment did not pursue its appellate remedy, the proceeding remained pending, for *Younger* purposes, at the time of the federal suit.

COUNSEL

Roger Jon Diamond, Santa Monica, California, for the plaintiffs-appellants-cross-appellees.

James J. Clancy, Sun Valley, California, for the defendants-appellees-cross-appellants.

OPINION

PER CURIAM:

Nevada Entertainment applied for a license to operate an adult video store in the City of Henderson, Nevada. Shortly before Nevada Entertainment filed its application, the City adopted a zoning code limiting adult businesses to Commercial Highway ("CH") zones. The City had no CH zones when the new code was adopted. The City told Nevada Entertainment it could operate an adult business only in a CH zone, and since no such zone existed, Nevada Entertainment would have to apply for a zone change or variance as well as a con-

ditional use permit. Instead, Nevada Entertainment filed a new license application for a general rather than an adult video store. The City issued a license to operate a general video store. Nevada Entertainment opened an adult video store.

The City commenced a proceeding before the City Council to revoke Nevada Entertainment's license because Nevada Entertainment misrepresented the nature of the business it intended to open. The City Council issued an order revoking the license. Rather than appealing this order to the state district court, Nevada Entertainment filed this action in federal court challenging the constitutionality of the zoning ordinances and seeking injunctive relief.

The City argued the district court was required to abstain under *Younger v. Harris*, 401 U.S. 37 (1971). The district court rejected the abstention claim but granted judgment for the City on the ground Nevada Entertainment was barred from challenging the constitutionality of the zoning ordinances because it had obtained its license by fraud. Nevada Entertainment appealed. The City cross-appealed the court's refusal to abstain. We conclude the district court was required to abstain under *Younger*.

ABSTENTION

We consider *de novo* whether *Younger* abstention was required. *World Famous Drinking Emporium v. City of Tempe*, 820 F.2d 1079, 1081 (9th Cir. 1987). *Younger* abstention is required when: (1) state proceedings, judicial in nature, are pending; (2) the state proceedings involve important state interests; and (3) the state proceedings afford adequate opportunity to raise the constitutional issue. *Middlesex Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). Where *Younger* abstention is applicable, " 'a district court must dismiss the federal action.' " *World Famous Drinking Emporium*, 820 F.2d at 1081 (quoting *Fresh Inter-*

national Corp. v. Agricultural Labor Relations Bd., 805 F.2d 1353, 1356 (9th Cir. 1986)).

1. *Pending State Court Proceedings*

When Nevada Entertainment filed this action, the administrative proceeding before the City Council revoking Nevada Entertainment's license was complete. Nevada Entertainment had ten days within which to appeal the Council's order to the Nevada district court. It did not do so, but instead filed this suit under 42 U.S.C. § 1983 challenging the constitutionality of the city's ordinance and seeking injunctive relief. The issue is whether a state administrative proceeding of a kind subject to *Younger* is pending within the meaning of *Younger* when the administrative process has been concluded but judicial review in state court is available.

Ordinarily, when judgment has been entered for the state in a state trial court proceeding to which *Younger* applies, "a party may not procure federal intervention by terminating the state judicial process prematurely — forgoing the state appeal to attack the trial court's judgment in federal court." *New Orleans Pub. Serv., Inc. ("NOPSI") v. City Council of New Orleans*, 491 U.S. 350, 369 (1989) (citing *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608 (1975)). As the Court said in *Huffman*, federal intervention "is likely to be even more disruptive and offensive [at this point] because the State has already won a *nisi prius* determination that its valid policies are being violated in a fashion which justifies judicial abatement." 420 U.S. at 608-09.

Huffman, however, involved failure of the federal plaintiff to appeal a lower court judgment rather than failure to seek judicial review of an order entered in a state administrative proceeding. *Younger* plainly applies to state administrative proceedings, which are judicial in nature, *Middlesex*, 457 U.S. at 432-34, as was the license revocation proceeding involved in this case, but the Supreme Court has not expressly held that

Huffman applies if the federal plaintiff has foregone available state court judicial review of the decision in an administrative proceeding.

The holding in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), and dicta in *NOPSI* strongly suggest that a state administrative proceeding and state judicial review of that proceeding are a single unitary process for *Younger* purposes and federal court intervention cannot be obtained without first exhausting the state court appellate remedy. In *Dayton Christian Schools*, Dayton sought to enjoin a state administrative proceeding brought against it to enforce the state's anti-discrimination laws. The issue was whether Dayton could raise its Free Exercise and Establishment Clause claim in the administrative proceeding. The Supreme Court concluded appellant probably could raise its constitutional claim before the Ohio Civil Rights Commission, but held that even if Ohio law precluded the Commission from considering such claims, "it is sufficient . . . that constitutional claims may be raised in state-court judicial review of the administrative proceeding." *Id.* at 629. Since under this holding *Younger* applies to a pending administrative proceeding even though constitutional claims cannot be raised until state court review, there is no reasoned basis for holding that litigants in such proceedings may forego state court review of the administrative decision in favor of a federal lawsuit.

In *NOPSI*, the Court assumed, without deciding, that *Dayton Christian Schools* requires the state administrative proceedings and judicial review of such proceedings be treated as a unitary process that is not to be interrupted by federal court intervention, any more "at the conclusion of the administrative stage than during it." *NOPSI*, 491 U.S. at 369. The Court noted "[t]he fact that *Dayton Christian Schools* relied, as an alternative argument, upon the fact that the federal challenge could be made upon appeal to the state courts, . . . suggests, perhaps, that an administrative proceeding to

which *Younger* applies cannot be challenged in federal court even after the administrative action has become final." *Id.* at n.4.[1]

[1] The considerations relied upon in *Huffman* to support the requirement that state appellate review of a state court judgment be exhausted before federal court intervention is permitted apply equally to state judicial review of the decision in a state administrative proceeding, which is judicial in nature.

Dayton Christian Schools rejected the suggestion that requiring a litigant, asserting violation of constitutional rights, to pursue judicial review of a state administrative proceeding as a precondition to federal court intervention under 42 U.S.C. § 1983 is inconsistent with the holding in *Patsy v. Florida Bd. of Regents*, 457 U.S. 496 (1982), that § 1983 plaintiffs need not exhaust state administrative remedies. The Court said:

> The application of the *Younger* principle to pending state administrative proceedings is fully consistent with *Patsy* . . . , which holds that litigants need not exhaust their administrative remedies prior to bringing a § 1983 suit in federal court. *Cf. Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607-11 (1975). Unlike *Patsy*, the administrative proceedings here are coercive rather than remedial, began before any substantial advancement in the federal action took place, and involve an important state interest.

Dayton Christian Schools, 477 U.S. at 628 n.2. *See also Patsy*, 457 U.S. at 518-19 (White J., concurring) (the holding in *Patsy* is "fully consistent with [the] decisions that a defendant in a civil or administrative enforcement proceeding may

[1]The Court did not decide the question, concluding instead *Younger* did not apply because the administrative proceeding at issue in *NOPSI* was legislative rather than judicial in nature. *Id.* at 369-370.

not enjoin and sidetrack that proceeding by resorting to a § 1983 action in federal court") (citing *Huffman*).

The crucial distinction between *Dayton Christian Schools* and *Patsy* is that in *Patsy* the administrative proceeding was a remedial action instituted by plaintiff to redress a wrong inflicted by the state, while *Dayton Christian Schools* involved an administrative proceeding initiated by the state to enforce a violation of state law.[2] As the Seventh Circuit has pointed out, the latter situation invokes primary reasons for *Younger* abstention:

> [*Younger's*] central meaning is that a federal district court may not, save in exceptional circumstances, enjoin, at the behest of a person who has actually or arguably violated a state statute, a state court proceeding to enforce the statute against that person. (internal citation omitted). His remedy is to interpose his federal claims as a defense in that action.
>
> . . .
>
> The state normally is entitled to prosecute or otherwise proceed against the violators of its laws in its own courts without interruption by a federal district court. But the principle [that a § 1983 plaintiff may

[2]Courts of Appeals of four circuits have considered the problem with varying results. *See Alleghany Corp. v. Pomeroy*, 898 F.2d 1314 (8th Cir. 1990) (*Younger* abstention requires litigant to seek available state court review of administrative proceedings); *Thomas v. Texas State Bd. of Medical Examiners*, 807 F.2d 453 (5th Cir. 1987) (no state court proceeding pending if administrative proceeding is concluded, even if state court review of constitutional claims is available); *Alleghany Corp. v. Haase*, 896 F.2d 1046 (7th Cir. 1990) (*Younger* requires a litigant to seek state court review of an administrative proceeding if the administrative proceeding was brought by the state to enforce a violation of state law), *vacated as moot*, 499 U.S. 933 (1991); *Kercado-Melendez v. Aponte-Roque*, 829 F.2d 255 (1st Cir. 1987) (same).

> initiate remedial action to enjoin unconstitutional state official conduct] stands unimpaired in cases in which the federal plaintiff has not violated state law, has not exposed himself to a state enforcement proceeding, is not a defendant in such a proceeding, but merely seeks to sweep away an illegal obstacle to his activities.

Alleghany Corp. v. Haase, 896 F.2d 1046, 1050-51 (7th Cir. 1990), *vacated as moot*, 111 S. Ct. 1383 (1991).

[2] In cases such as *Dayton Christian Schools*, it is the state administrative proceeding itself that plaintiffs seek to challenge. "Comity and federalism concerns are at their highest in such cases since the legitimacy of both the state proceeding and its underlying statutory predicate are at stake." *Kercado-Melendez v. Aponte-Roque*, 829 F.2d 255, 260 (1st Cir. 1987).[3] It is consistent with both *Younger* and *Patsy* for a federal court to abstain from intervening where an administrative proceeding has been initiated by the state to enforce state law even if those proceedings have concluded, where adequate state judicial review was available to the federal plaintiff. The City Council initiated the administrative proceeding in this case to enforce municipal code provisions requiring license applicants to complete applications truthfully. Because the administrative proceeding was coercive and brought by the state to enforce its laws, *Younger* required the federal court to abstain from intervening unless and until that proceeding, including review by the state court, was complete. Since Nevada Entertainment did not pursue its appellate remedy, the

[3]In *Kercado-Melendez*, the First Circuit, like the Seventh Circuit in *Haase*, held abstention was not required under *Younger* where the state administrative proceeding was a remedial action initiated by the federal plaintiff. However, in *Kercado-Melendez*, the administrative action was initiated by the state in response to an alleged violation of its laws. *See* 829 F.2d at 267-68 (Breyer, J., dissenting). We express no view on this precise situation.

proceeding remained pending, for *Younger* purposes, at the time of the federal suit.[4]

2. *Opportunity to Raise the Constitutional Claims*

Nevada Entertainment attempted to raise its constitutional claims in the revocation hearing, but the City Council refused to listen.[5] Whether the federal claim could have been raised in the administrative proceeding is of no moment, however, if it could have been raised in subsequent state court judicial review. *Dayton Christian Schools*, 477 U.S. at 629.

The relevant provisions of the Henderson Municipal Code are set out in the margin.[6] The district court held that under the Code the state court could review only "the specific rulings on questions of law which the petition contends constitutes error," and that, by refusing to rule on Nevada Entertainment's constitutional claims, the City Council could and did preclude state court review of these claims (quoting H.M.C. § 4.06.160(a)). When read in full, however, the sentence in subsection (a) upon which the district court relied

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[4]Nevada Entertainment cites only *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505 (1993), in support of its contention that a federal plaintiff need not exhaust available state judicial review of a state administrative order before seeking injunctive intervention under § 1983. There is nothing in *City of Cincinnati* to indicate abstention was sought or whether the requirements for abstention were present.

[5]The Mayor stated: "I'm not trying the Constitution here and don't want to go into all that. We have a set case here that we are trying to decide."

[6]§ 4.06.160 of the Henderson Municipal Code reads:

> Any person aggrieved by a final decision or order of the City Council made after hearing or rehearing as heretofore provided, and whether or not a petition for rehearing was filed, may obtain a judicial review of questions of law thereof in the Eighth Judicial District Court.
>
> (a) . . . . The petition for review shall set forth the order or decision appealed from, and shall set forth the specific rulings on questions of law which the petition contends constitutes error.

does not qualify the general grant of authority to review all questions of law found in the opening sentences of the provision; it simply directs the petitioner to set forth in his petition the rulings he appeals. Nothing in the Code precludes a petitioner from claiming that a "specific ruling" of the City Council "constitutes error" because it violates the Constitution, even if the City Council refused to address that question. We conclude the Municipal Code provided appellant an adequate opportunity to raise its federal claim on review in state district court.

3. *Important State Interest*

The state has an important interest in enforcing licensing schemes such as that at issue here. *See World Famous Drinking Emporium*, 820 F.2d at 1082-83. More significantly, the "importance of the state interest may be demonstrated by the fact that the noncriminal proceedings bear a close relationship to proceedings criminal in nature, as in *Huffman*," *Middlesex*, 457 U.S. at 432; and we add, as in this case.

ATTORNEYS FEES

The City argues it should have been awarded attorneys fees under 42 U.S.C. § 1988. Prevailing defendants in civil rights actions are awarded attorneys fees only in "exceptional cases." *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 202 (9th Cir. 1988). *See also Hughs v. Rowe*, 449 U.S. 5, 14 (1980) (district court has discretion to award attorneys fees to a prevailing defendant under § 1988 where "the plaintiff's action . . . is groundless or without foundation"). The district court did not abuse its discretion in concluding this was not such a case. Nor do the circumstances justify an award of fees on appeal.

CONCLUSION

The decision of the district court refusing to abstain from exercising jurisdiction is REVERSED and the case is

REMANDED to the district court with instructions to vacate its judgment and dismiss the complaint.

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APPENDIX 4

RESPONSE TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC IN NEVADA ENTERTAINMENT INDUSTRIES, INC., ET AL. v. CITY OF HENDERSON, ET AL., NO. 92- 17054 [DC # CV-90-00264-LDG Nevada (Las Vegas)], FILED JANUARY 18, 1994.

[Reference: Petition at page 19 and 26].

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP Plaintiffs & Appellants vs. CITY OF HENDERSON, a Nevada Municipal Corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON, Defendants & Appellees	No. 92-17054 No. 93-15052 [DISTRICT COURT NO. CV-S-90-264 LDG-LRL]

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA,

HON. LLOYD D. GEORGE, DISTRICT JUDGE

RESPONSE TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES..... ii

RESPONSE TO PETITION FOR REHEARING AND SUGGESTION FOR A REHEARING EN BANC.... 1

CONCLUSION..... 7

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

Ex Parte Young,
209 U.S. 123 (1908)..... 5

Huffman v. Pursue, Ltd.,
420 U.S. 592 (1975)..... 2, 3, 4, 5, 7, 8, 9

Louisiana v. Jumel,
107 U.S. 711 (1883)..... 3

Nevada Entertainment Industries, Inc. v. City of Henderson,
8 F.3d 1348 (1993)..... 2, 7

New Orleans Public Service v. City Council of New Orleans,
491 U.S. 350 (1989)..... 4, 6, 7

Watson v. Buck,
313 U.S. 387 (1941)..... 6

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,
473 U.S. 172 (1985)..... 6

STATE CASES

Las Vegas v. Nevada Entertainment, Inc.
772 P.2d 1275 (Nev.S.Ct., 1989)..... 3

CONSTITUTIONAL PROVISIONS

United States Constitution
Tenth Amendment..... 2, 8
Eleventh Amendment.....2, 3, 4, 8

FEDERAL STATUTES

42 U.S.C. Section 1983..... 5

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP Plaintiffs & Appellants vs. CITY OF HENDERSON, a Nevada Municipal Corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON, Defendants & Appellees	No. 92-17054 No. 93-15052 [DISTRICT COURT NO. CV-S-90-264 LDG-LRL]

RESPONSE TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Comes now the City of Henderson, a Nevada Municipal Corporation and James Goff, Chief of Police of the City of Henderson (hereinafter "City of Henderson") to file its response to the Petition of Nevada Entertainment Industries, Inc., a Nevada Corporation and Daniel Bishop (hereinafter "Nevada

Entertainment") for Rehearing and Suggestion for Rehearing en Banc, as required by this Court's Order, filed December 27, 1993.

City of Henderson respectfully invites this Court's attention to the fact that this Court, in its three judge panel opinion on November 2, 1993, did not deem it necessary to specifically address[1] the analytical argument re "Huffman" that the City of Henderson has urged continuously in the past three years of litigation and in its Opening and Reply briefs and oral argument in

---

[1] See Nevada Entertainment Industries, Inc. v. City of Henderson, 8 F.3d 1348, at 1350 ["The consideration relied upon in Huffman to support the requirement that state appellate review of a state court judgment be exhausted before federal court intervention is permitted apply equally to state judicial review of the decision in a state administration proceeding, which is judicial in nature."

this appeal. In such litigation, the City has insisted that, from an analytical standpoint, the abstention doctrine expressed by the United States Supreme Court in Huffman v. Pursue, Ltd., 420 U.S. 592 (involving a civil public nuisance abatement lawsuit filed by the State) was grounded in subject matter jurisdiction and the Tenth and Eleventh Amendment to the Federal Constitution, and that the United States Supreme Court fashioned the Huffman rule for the guidance of federal District Courts and as a precaution, to assure that the federal system, under its civil rights jurisdiction, would not interfere in a civil case such as this license revocation hearing brought by the City of Henderson, acting for the State in the State judicial system against a resident where, to do so, might (in the future) operate in a fashion which would result in a Tenth or Eleventh Amendment

interference with and violation of State Powers under the Federal Constitution. See Appellees' Opening and Answering Briefs, at page 6, line 12 through page 7, line 26, and Reply Brief, at page 1, line 19 through page 5, line 20.

In both briefs (see Opening Brief at page 38, line 16 through page 40, and Reply Brief at page 5, line 9 through page 6, line 26), and at oral argument, the City of Henderson argued that the District Court's fact findings on the merits that Nevada Entertainment's conduct was fraudulent acted retrospectively to corroborate[2] the

---

[2] The District Court's Findings proved that the City Council's actions were not ultra vires. It is hornbook law that, under the Eleventh Amendment, a citizen may not sue the State in federal court, and that he may do so pursuant to a 42 U.S.C. Section 1983 civil rights lawsuit only if the State is deemed to be acting "ultra vires." The City's acts were not ultra vires.

(Footnote Continued)

City's claims that: (1) Huffman did control; and (2) the federal court's assumption of jurisdiction over and interference with a state matter was wrongful; and (3) the State of Nevada and the City of Henderson, acting for the State (which had the right to assert the Constitutional bar of the Eleventh Amendment, since the relief sought in the federal action would require City officials, as officers of the state, to act contrary to the positive orders of the supreme political power of the State, whose creatures they are [see Louisiana v. Jumel, 107 U.S. 711, at 721

(Footnote Continued)
Under Nevada law, cities are empowered to act for the State, and are authorized to issue business licenses within the City and to revoke the same as to fraudulent applications, where such are found to be fraudulent by the City Council, sitting as a quasi judicial fact finder in the state judicial system. See City of Las Vegas v. Nevada Entertainment, Inc., 772 P.2d 1275 (Nev. S.Ct., 1989). (Our Emphasis.)

(1883)], has suffered an actual Eleventh Amendment injury for the past three years, which, in no way, could be compensated for by any monetary award from Nevada Entertainment.

Because this Court, in its November 2, 1993 opinion, did not find it necessary to address the City of Henderson's analysis as to the "lack of jurisdiction" basis of Huffman, Nevada Entertainment now seizes upon this Court's silence on that issue and makes a new and bolder claim as though "lack of jurisdiction" were not at the crux of the Huffman abstention doctrine. They now argue, in effect, that "Granted that the City acted properly in revoking Nevada Enterprises license for fraud in connection with its application, it is really of no moment that the City of Henderson has suffered an Eleventh amendment infringement by virtue of such federal interference [an injunction

prohibiting enforcement of Nevada Law, i.e.: operating a business without a license is a misdemeanor.] Further, Nevada Entertainment is again renewing its efforts to scuttle the Huffman rule by conceding the finality of the fact finding by the City Council in an effort to bring themselves within the unexplored parameters of Footnote 4 of New Orleans Public Service v. City Council of New Orleans, 491 U.S. 350 (1989), in order to support its contention that the remaining allegations stated a good cause of action for the District Court's consideration. They now ask an "en banc" Court to circumvent the Huffman doctrine by ruling that the City of Henderson has "consented" to federal jurisdiction -- in the face of: (1) the City's three year's dogmatic stance to the contrary, which entailed two trips to the Court of Appeals and two trips to

the United States Supreme Court, and (2) the City of Henderson's claim for attorneys fees as a prevailing defendant on the grounds that Nevada Entertainment's federal lawsuit was blatantly violative of the Huffman Doctrine and notoriously improper inasmuch as their attorneys were experienced "adult business" attorneys who were well aware as to what the United States Supreme Court intended by its decision in Huffman and what was at stake (i.e. the jurisdictional basis for Huffman). For three years its attorney have shrewdly remained silent, and refused to carry out their duty to provide the trial court with legal research and rebuttal argument to the City's analysis re jurisdiction in the City's briefs.

In essence, Attorney Diamond is now proposing that an en banc majority of this Court should avoid the Huffman

abstention doctrine (which was correctly applied by the three-judge panel) by making a new and different finding that the City "consented" to federal jurisdiction. Analytically, this new and different claim by Nevada Entertainment cannot be reconciled with the record below which is before this Court.

If the City of Henderson acted within the scope of its authority in conducting the license revocation hearing and in revoking the license, as Nevada Entertainment apparently is now willing to acknowledge, then it must necessarily follow that no federal cause of action has been stated or can be maintained because: (1) the City was not involved in an ultra vires act and (2) there was no Civil Rights violation to support federal jurisdiction in that the essential "Ex Parte Young" [209 U.S 123 (1908)] allegation is lacking for

federal jurisdiction under 42 U.S.C. Section 1983. It also follows therefrom that, as suggested by Justice Kelleher at oral argument, Nevada Entertainment lacks standing to attack the remaining statutes for a number of reasons: First, it had not applied for the right to operate a conditional use, etc.[3] Further, those newly enacted ordinances have not been given an initial interpretation by the Nevada State Court, and the federal court's consideration of the same was barred by

---

[3] Judicial review was premature, presenting a "ripeness" problem, since the federal plaintiffs had not obtained any administrative decision, final or otherwise, regarding the application of the Ordinances in question to their property. The question of whether administrative remedies must be exhausted is conceptually distinct from the question whether an administrative action must be final before it is judicially reviewable, see Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985).

Watson v. Buck, 313 U.S. 387 (1941). See City of Henderson's Opening and Answering Brief, at pages 3, 22, 28, 34, and 36. Finally, an even greater (and insurmountable) barrier is the federal trial Court's express fact finding on the merits that, as found by the City Council, the Appellant was guilty of fraud in its application for the license, and was barred, by the "clean hands" doctrine from obtaining a consideration as to the Constitutionality of the other ordinances in the federal system.

This sudden switch in argumentation and willingness to stipulate that the state license revocation proceedings, together with the fact finding of fraud had been finalized at the time Nevada Entertainment filed their federal civil rights lawsuit, is an attempt to bring appellant Nevada Industries within the parameters of footnote 4 of New Orleans

Public Service v. City Council of New Orleans, 491 U.S. 350 (1989), in which the High Court noted that it had not spoken definitively on the application of the Huffman abstention doctrine in situations where the state administrative proceedings had been finalized at the time the federal complaint was filed. If a unilateral "stipulation" such as this were to give Nevada Entertainment standing to raise the constitutional question discussed in footnote 4, it also would lock Nevada Entertainment in a bear trap of greater consequences. No matter what an en banc Court would decide as to the application of Huffman to the narrow trial facts which are of record and the res judicata and/or collateral estoppel effect posed by footnote 4 regarding the City Council's revocation of license on grounds of fraud, it must also consider that part of the federal record below

which reflects that Assistant City Attorney Liz Conroy, in opposing the granting of the Temporary Restraining Order on April 27, 1990, specifically made the argument that Licensees were not entitled to any type of equitable relief under 42 U.S.C. Section 1983 because of the principle, "He who comes into a court of equity must have clean hands" (see Appellees' Answering Brief at page 45), and the United States District Court ultimately applied the "clean hands" doctrine and refused to acknowledge standing in Nevada Entertainment to consider the other collateral issues framed in the Nevada Entertainment federal lawsuit.

CONCLUSION

Appellant City of Henderson is of the view that this Court's three judge panel opinion, reported in 8 F.3d, at 1348-1353, is eminently correct in so

far as it has applied the Huffman abstention doctrine to the narrow trial facts which were before the United States District Court.

The City of Henderson in this regard, however, makes these further contentions:

(1) The Court's opinion would have greater value to other federal appellate courts and litigants were it to more fully elaborate upon what it meant at page 1350, when it referred to "The considerations relied upon in Huffman." Did the Court mean, as the City of Henderson concluded, that the United States Supreme Court fashioned the Huffman rule (as to civil litigants) for the guidance of federal district courts so as to require them to abstain or require "heightened pleadings" where the pleadings show a strong probability that the assumption of federal jurisdiction would lead to the type of Tenth and

Eleventh Amendment infringement of state powers which occurred herein, as corroborated by the United State District Court's finding of fraud, retrospectively applied?

(2) The cases cited by Nevada Entertainment and the Amicus Curiae do not affect this Court's opinion in as much as they are not apposite in this Huffman-type appeal which is controlled by an extremely narrow set of facts. Further, their analyses are defective in their apparent failure to weigh in the balance "the considerations relied upon in Huffman." The City of Henderson is of the further view that were this Court's opinion to be expanded to include an elaboration of its language "The considerations relied upon in Huffman," this Court's opinion would materially alter the manner in which the Huffman Doctrine is applied in those cases. It would appear, however, that

if such opinion is not expanded, a substantial federal question will be raised which may require resolution by the United States Supreme Court.

(3) Finally, the City is of the opinion that this Court's opinion requires a remand to the trial court for the exercise of the district court's discretion on the question of attorney's fees, in the light of the entire record (including this Court's opinion that the trial court erred in that the Huffman Doctrine should have been applied), and the City of Henderson's claim that, notwithstanding Nevada Entertainment's attorneys had both subjective and objective knowledge from existing case law that the narrow facts of record established a clear case for application of the Huffman Doctrine, they, neverthless, recklessly continued such litigation by remaining silent and

refusing to address the City's arguments on the jurisdictional aspects.

Dated: January 16, 1994

Respectfully submitted,

_____

James J. Clancy
For Defendants,
Appellees &
Cross-Appellants

APPENDIX 5

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN NEVADA ENTERTAINMENT INDUSTRIES, INC., ET AL. v. CITY OF HENDERSON, ET AL., NO. 92-17054/ 93-15052 [DC # CV-90-00264-LDG Nevada (Las Vegas)], FILED APRIL 7, 1994.

[Reference: Petition at page 4, 6, 8, and 19].

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada Corporation; DANIEL BISHOP,
Plaintiffs-Appellants-Cross-Appellees,

v.

CITY OF HENDERSON, a Nevada Municipal Corporation; JAMES GOFF, Chief of Police and the City of Henderson,
Defendants-Appellees-Cross-Appellants.

Nos. 92-17054
93-15052

D.C. No.
CV-90-00264-LDG

ORDER

Filed April 7, 1994

Before: James R. Browning and William C. Canby, Jr., Circuit Judges, and Robert J. Kelleher,* Senior District Judge.

ORDER

The petition for rehearing is granted. The opinion reported at 8 F.3d 1348 (9th Cir. 1993) is withdrawn.

---

*The Honorable Robert J. Kelleher, Senior Judge, United States District Court for the Central District of California, sitting by designation.

APPENDIX 6

MEMORANDUM DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN NEVADA ENTERTAINMENT INDUSTRIES, INC., ET AL. v. CITY OF HENDERSON, ET AL., NO. 92- 17054 [DC # CV-90-00264-LDG Nevada (Las Vegas)], FILED MAY 4, 1994.

[Reference: Petition at page 4, 6, 8, 19, 20, 48, and 53].

[Filed May 4, 1994; Cathy A. Catterson, Clerk, U.S. Court of Appeals]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation, et al.,	Nos. 92-17054 93-15052
Plaintiffs/ Appellants/ Cross-Appellees,	D.C. No. CV-90-00264-LDG
	MEMORANDUM*
CITY OF HENDERSON, a Nevada Municipal Corporation et al.	
Defendants/ Appellees/ Cross-Appellants.	

Appeal from the United States District Court for the District of Nevada
Lloyd D. George, District Judge, Presiding

Argued and Submitted May 10, 1993

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

San Francisco, California

Before: BROWNING and CANBY, Circuit Judges, KELLEHER,** Senior District Judge.

Nevada Entertainment applied for a license to operate an adult video store in the City of Henderson, Nevada. Shortly before Nevada Entertainment filed its application, the City adopted a zoning code limiting adult businesses to Commercial Highway ("CH") zones. The City had no CH zones when the new code was adopted. The City told Nevada Entertainment it could operate an adult business only in a CH zone, and, since no such zone existed, it would have to apply for a zone change or variance as well as a conditional use permit. Instead, Nevada Entertainment filed a

---

**The Honorable Robert J. Kelleher, Senior Judge, United States District Court for the Central District of California, sitting by designation.

new license application for a general rather than an adult video store. The City issued a license to operate a general video store. Nevada Entertainment then opened an adult video store.

The City commenced a proceeding before the City Council to revoke Nevada Entertainment's license because Nevada Entertainment had misrepresented the nature of the business it intended to open. After a hearing, the City Council issued an order revoking the license because of the misrepresentation in Nevada Entertainment's application. Rather than appealing this order to the state district court, Nevada Entertainment filed this action in federal court challenging the constitutionality of the zoning ordinances and seeking injunctive relief.

The City argued the district court was required to abstain under Younger v. Harris, 401 U.S. 37 (1971). The district court rejected the abstention claim but granted judgment for the City on the ground that under Dennis v. United States, 384 U.S. 855 (1966), Nevada Entertainment was barred from challenging the constitutionality of the zoning ordinances because it had obtained its license by fraud. Nevada Entertainment appealed. The City cross-appealed the court's refusal to abstain. We affirm the judgment of the district court on the basis of Dennis and dismiss the cross-appeal as moot.

I. NEVADA ENTERTAINMENT'S APPEAL

The district court properly declined to consider the constitutionality of the ordinances. "One who elects [to commit fraud] as a means of self-help may not escape the consequences by urging that his conduct

be excused because the statute which he sought to evade is unconsitutional." Dennis, 384 U.S. at 867; see also Ancafora v. Board of Educ. of Montgomery County, 491 F.2d 498 (4th Cir. 1974) (teacher could not challenge dismissal on the basis of discrimination where he was dismissed because he lied on his application). Nevada Entertainment's license was not revoked because of the nature of its business activity, but rather because Nevada Entertainment's application misrepresented the nature of its business.

Nevada Entertainment argues the district court should not have relied on Dennis because the issue of fraud was "never pleaded nor briefed." However, the federal complaint for declaratory and injunctive relief specifically alleged "[p]laintiffs made no material misrepresentations on their application," and the City's answer

denied the truth of this allegation. As the district court recognized, the City contended throughout the litigation that the constitutionality of the ordinances was not at issue since "the plaintiffs' ... license was revoked because of their own fraud, not because of the nature of their business." The stipulated record on which the case was tried in the district court included transcripts of the city council hearing, which was devoted exclusively to the issue of fraud. Nevada Entertainment had adequate notice that its fraudulent conduct was one of the issues in the case.

Nevada Entertainment also argues the administrative record is insufficient to support the district court's finding of fraud because there was no opportunity to present "affirmative evidence" to support the contention that it was "induced" to

falsify the license application. However, the testimony on which Nevada Entertaiment relies to support this inducement argument was in the record before the district court, and Nevada Entertainment does not point to any additional evidence in support of its argument or suggest it would have been barred from presenting such additional evidence to the city council. The district court's finding of deceptive conduct is amply supported by the record.

Nevada Entertainment argues that even if its conduct were deceptive, the district court should have allowed some "deception" to permit Nevada Entertainment to position itself to challenge the constitutionality of the ordinances. Nevada Entertainment offers no reason why it could not simply have challenged the denial of the original

application rather than submitting a second, fraudulent application.

II. THE CITY'S CROSS-APPEAL

The City cross-appealed arguing Nevada Entertainment's entire action should have been dismissed under Younger. Since the City has prevailed in the district court and on appeal, any discussion of the City's argument would be advisory. See Lindquist v. Idaho State Bd. of Corrections, 776 F.2d 851, 853-54 (9th Cir. 1985). We decline to reach the abstention issue and dismiss the cross-appeal as moot.

The judgment of the district court if AFFIRMED. The City's cross-appeal is DISMISSED as moot.

APPENDIX 7

PETITION FOR REHEARING IN NEVADA ENTERTAINMENT INDUSTRIES, INC., ET AL. v. CITY OF HENDERSON, ET AL., NO. 92- 17054 [DC # CV-90-00264-LDG Nevada (Las Vegas)], FILED MAY 18, 1994, FILED ON BEHALF OF THE CITY OF HENDERSON ET AL.

[Reference: Petition at page 5, 6, and 21].

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP Plaintiffs & Appellants vs. CITY OF HENDERSON, a Nevada Municipal Corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON, Defendants & Appellees	No. 92-17054 No. 93-15052 [DISTRICT COURT NO. CV-S-90-264 LDG-LRL]

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA,

HON. LLOYD D. GEORGE, DISTRICT JUDGE

PETITION FOR REHEARING

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES..... ii

PETITION FOR REHEARING..... 1

INTRODUCTION..... 2

FACTS AND LAW WHICH THE COURT OVERLOOKED..... 2

AN APPARENT CONFLICT WITH ANOTHER DECISION OF THIS COURT..... 2

RE NEW ISSUE RAISED IN MEMORANDUM DECISION..... 2

RE NEW ISSUE RAISED IN MEMORANDUM DECISION..... 3

ARGUMENT..... 3

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

Aiona v. Judiciary of the State of Hawaii, 17 F.3d 1244 (1994).....2, 3, 7, 8, 9, 10, 11, 12, 14

Fresh International Corp. v. Agricultural Labor Relations Bd., 805 F.2d 1353 (9th Cir., 1986).....14

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)..... 2, 3, 5, 6, 7, 8, 10, 11, 12, 13

Nevada Entertainment Industries, Inc. v. City of Henderson, 8 F.3d 1348 (1993)..... 3, 10

Nintendo of America, Inc. v. Lewis Galoob Toys, Inc., 94 DJ DAR 2055..... 15

World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 (CA 9, 1987).....11

CONSTITUTIONAL PROVISIONS

United States Constitution
Tenth Amendment.....6, 7, 8
Eleventh Amendment.....5, 6, 7, 8

FEDERAL STATUTES

42 U.S.C.
Section 1983..... 4, 5, 13
Section 1988.....11

FEDERAL RULES

Ninth Circuit Rules,
Rule 36-3..... 3

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP Plaintiffs & Appellants vs. CITY OF HENDERSON, a Nevada Municipal Corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON, Defendants & Appellees	No. 92-17054 No. 93-15052 [DISTRICT COURT NO. CV-S-90-264 LDG-LRL]

PETITION FOR REHEARING

TO THE CLERK OF THE COURT:

The City of Henderson, et al. petition the Court to vacate its order of April 7, 1994 and decision of May 4, 1994, in order to reconsider the City's Cross-appeal and whether the issues presented therein are moot, in light of certain material facts and law

overlooked by the Court, and an apparent conflict with another Decision of this Court; and to reexamine its order that said memorandum "is not appropriate for publication and may not be cited.

Respectfully submitted,

_____

James J. Clancy
For Defendants/Appellees,
and Cross-Appellants

INTRODUCTION

City of Henderson, a Nevada Municipal Corporation, et al., Defendants/Appellees and Cross-Appellants (hereinafter "City of Henderson") petition the Court for a rehearing on the following grounds:

FACTS AND LAW WHICH THE COURT OVERLOOKED

1. Material points of fact and law are overlooked in the Court's Memorandum decision of May 4, 1994, and in this Court's decision on November 2, 1993 which applied the law expressed in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), which was withdrawn by its Order, dated April 7, 1994.

AN APPARENT CONFLICT WITH ANOTHER DECISION OF THIS COURT

2. The law expressed in this Court's November 2, 1993 opinion, which was withdrawn [with respect to the applicability of Huffman to the fact situation of record herein], conflicts

with the law expressed by another panel of the Ninth Circuit in Aiona v. Judiciary of the State of Hawaii, argued and submitted November 1, 1993, and decided March 3, 1994, which also applied Huffman, but in a different manner, which opinion was published in the 17 F.3d, Vol. No. 2 advance sheets (at 1244) dated April 25, 1994, and received in the May 9, 1994 mail. Said conflict with respect to the application of the Huffman test (rule of law), expressed in the Aiona case, was not addressed in this Court's opinions.

RE NEW ISSUE RAISED IN MEMORANDUM DECISION

3. This Court's order at page 1 of its memorandum decision filed May 4, 1994, that said disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3, as applied to the

trial facts and law applied in this cause, contravenes due process and equal protection of the law principles expressed in the federal constitution and Common Law "precedent," which is dependent upon and developed by a comparison and resolution of the conflicts in such cases.

RE NEW ISSUE RAISED IN MEMORANDUM DECISION

4. The City's cross-appeal is not moot as held in this Court's memorandum decision, for all of the reasons stated in 1-3 above.

ARGUMENT

The City of Henderson petitions this Court:

(1) to vacate its order of April 7, 1994, which granted the Petition for Rehearing of Plaintiffs/Appellants/ Cross-Appellees (hereinafter "Nevada Entertainment") and withdrew its opinion (filed on November 2, 1993, and reported

at 8 F.3d (9th Cir. 1993), which cites the Huffman case and holds it to to be a controlling "precedent," as was argued in the City of Henderson Cross-Appeal. The November 2, 1993 opinion should be amended to conform to the law expressed in Aiona; specifically, its holding that "a District Court must dismiss the federal action...and there is no discretion to grant injunctive relief;" and

(2) to vacate the Court's memorandum decision of May 4, 1994, which adverts to certain (but not all) of the trial facts which were before the U.S. District Court, and affirms the U.S. District Court's Judgment on an incomplete and erroneous recital of trial facts, without also considering the following omitted facts which appear in the appellate record in this Court, the most important of which is the fact that an injunction was issued by the

U.S. District Court and is presently in force as is the surety bond of $10,000, which was filed by Nevada Title.

FIRST: At the outset of Nevada Entertainment's Civil Rights lawsuit under 42 U.S.C. Section 1983, the U.S. District Court erroneously issued, over the City of Henderson's objections, both:

(1) a temporary restraining orde on April 27, 1990, and

(2) a preliminary injunction on June 4, 1990, which injunction is still in effect, having been continued pending disposition of this appeal by order of this Court, dated December 22, 1992).

The Federal Courts have, for a period of approximately four years barred the City from applying the laws of the State of Nevada with respect to issuance and enforcement of a quasi-judicial administrative order relating to a

license revocation proceeding before the Henderson City Council, which was coercive in nature. Said state order:

(a) was subject to appeal in the state court system, and review thereof was "pending" in the state system, when the Civil Rights Complaint was wrongfully filed by Nevada Entertainment for the purpose of interfering with the Nevada proceedings in contravention of the Eleventh Amendment, and

(b) became final and fully enforceable under Nevada state law, well before the occurrence of the U.S. District Court trial of said Civil Rights Complaint, in which the issues of fraud and the propriety of the City's actions with respect to license revocation were relitigated, in contravention of the Eleventh Amendment to the U.S. Constitution.

Since the quasi-judicial order was not appealed in state court, it became final and is fully enforceable under Nevada state law, and was entitled to recognition by the U.S. District Court, and by this Court of Appeal, in that:

(1) The City Council's quasi-judicial order had been lawfully rendered and should have been regarded by the federal courts as res judicata and/or collaterally estopping the Federal Plaintiffs; and

(2) Federal injuctive power here has been wrongfully used to enjoin enforcement of valid state laws and valid and enforceable state decisions under the test customarily applied in equity cases involving injunctive issues, without the requisite additional showing of the existence of exceptional circumstances which is mandated by the Huffman test in cases where Huffman is pleaded as a valid defense. The

memoradum decision, dated May 4, 1994, authorizes and condones:

> (a) use of a Federal Civil Rights Action under 42 U.S.C. Section 1983, by a citizen of the state of Nevada, to restrain the State of Nevada from enforcing valid state laws and valid state decisions; and
>
> (b) constitutes an invalid federal intrusion into the operations of the judiciary system of the state of Nevada, with respect to judicial review of state orders.

Under the 10th Amendment, Nevada (and its agent, the City of Henderson) is entitled to the free exercise of its Police Powers, and Nevada is entitled to control the development of the rules and procedures regarding the issuance and

judicial review of state orders issued pursuant to its Police Power.

Under the 11th Amendment, the judicial power of the United States does not extend to any action commenced and prosecuted against Nevada by its own citizen, over the objection of Nevada. To restrain the City of Henderson in the enforcement of its laws (regarding the issuance of revenue-based municipal business licenses) requires the restraint of valid state laws and the entire operation of the judicial system of the state of Nevada, with respect to judicial review of such orders, and the determination of the finality and enforceability of such orders.

The federal judiciary enjoined the operation of valid state laws <u>without cause</u>. The reasoning expressed in the memorandum decision of this Court, dated May 4, 1994, and the court's judgment with respect to the propriety of the use

of federal injunctive power, violates the 10th and 11th Amendments of the U.S. Constitution, and flies in the face of the Huffman test (Rule of Law) mandated by the U.S. Supreme Court (which precludes the issuance of such an injunction where the proponent fails to plead the additional facts which Huffman requires). This Court does not address that distinction in its opinions. See Aiona, discussed at page 9 infra.

SECOND: The U.S. District Court preliminary injunction, which was erroneously issued on June 4, 1990, and continued by this Court on December 22, 1992, and has barred the City from taking action for approximately four years (in violation of the 10th and 11th Amendments), is presently in force .

THIRD: At the hearing in the U.S. District Court, the
City opposed the issuance of an injunction on the grounds that the U.S.

District court could not grant equitable relief in the nature of an injunction because of the Equity "clean hands" maxim which bars the courtroom to those who have acted fraudulently.

At the trial of the Civil Rights Lawsuit on November 27, 1992 (two and one-half years after the granting of injunctive relief), the U.S. District Court again refused to apply the Huffman Test (Rule of Law) as mandated by the U.S. Supreme Court and instead, proceeded to reexamine the facts which were found in the Henderson City Council's quasi-judicial hearing under Nevada law, finding and declaring that the City Council's "fraud" finding was proper (i.e. was not ultra vires), and thereby establishing as a proven fact that, in entertaining jurisdiction over the Civil Rights Action, the Court's determination was in violation of the Huffman test (Rule of Law) and the Tenth

and Eleventh Amendments.

Rather than affirming that the Huffman test (Rule of Law) applied to the federal complaint and prohibited the Court from exercising jurisdiction and issuing an injunction, the U.S. District Court lifted its preliminary injunction and decided the case on the merits, denying federal relief on the very grounds that the City had urged to prevent issuance of any federal injunction at the time preliminary relief was issued (i.e. that the Equity maxim precluded the Court from assuming jurisdiction). On December 22, 1992, the Ninth Circuit stayed the U.S. District Court's Order and wrongfully continued that injunction in further violation of the Huffman test (Rule of Law) and the Tenth and Eleventh Amendments.

The Court of Appeal's May 4, 1994 memorandum decision flies in the face of

the test (Rule of Law) which was declared and mandated by the U.S. Supreme Court in Huffman v. Pursue, Ltd., 420 U.S. 592 (1978), for the purpose of preventing a potential Tenth and Eleventh Amendment conflict similar to that which had occurred in Huffman. By reexamining the facts which had been before the Nevada quasi-judicial body to permit the Court to arrive at its own de novo finding of "fraud" (an inherent violation of the Huffman Rule which contravenes the Tenth and Eleventh Amendment), and denying federal jurisdiction on that ground, the U.S. District Court and this Court of Appeal has repeated the very error that the Huffman Rule of Law was designed to prevent.

FOURTH: The opinion of the Ninth Circuit panel in Aiona v. Judiciary of the State of Hawaii, 17 F.3d 1244 (Mar. 3, 1994) (Poole, Wiggins, T.G. Nelson)

specifically held the rule of law to be that which the trial court and this Court of Appeal has refused to acknowledge; that is, that the Plaintiff has an additional burden of proof beyond that which is applied in Equity cases seeking an injunction, and the U.S. District Court has no discretion to grant an injunction as the U.S. District Court erroneously did below, absent the requisite showing of "extraordinary circumstances." See 17 F.3d 1244, at 1248-1249:

> "Under the Younger abstention doctrine, a federal court in most circumstances may not interfere with pending state criminal or civil proceedings, including state administrative proceedings. Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 106 S.Ct. 2718, 91 L.Ed.2d 512 (1986); Ronwin v. Dunham, 818 F.2d 675, 677-78 (8th Cir. 1987) (administrative proceeding regarding suspension of driver's license for speeding). Abstention is appropriate in favor of state proceedings if (1) the state proceedings are ongoing, (2) the proceedings implicate important state interests, and (3) the state

proceedings provide the plaintiff an adequate opportunity to litigate federal constitutional questions. Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982); accord Fresh Int'l Corp. v. Agricultural Labor Relations Bd., 805 F.2d 1353, 1357-58 (9th Cir. 1986). If these three circumstances exist, then a district court must dismiss the federal action ... [and] there is no discretion to grant injunctive relief. Fresh Int'l Corp., 805 F.2d at 1356 (citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 816 n. 22, 96 S.Ct. 1236, 1245, 47 L.Ed.2d 483 (1976)). [Our Emphasis.]

"If, however, the plaintiff can show that the state proceedings were instituted in bad faith, or if other extraordinary circumstances exist, then the federal court should not abstain. Younger, 401 U.S. at 53-54, 91 S.Ct. at 755. For example, if a statute 'flagrantly and patently' violates 'express constitutional prohibitions in every clause, sentence and paragraph' then federal intervention in state court proceedings is appropriate. Id. [Our Emphasis.]

"Here, state administrative proceedings and judicial proceedings were ongoing at the time the plaintiffs filed this section 1983 action[1], and the

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[1] This is the same fact situation which is before the Court in the instant case.

> plaintiffs do not contest that the state has an important state interest in keeping drunk drivers off the road [footnote omitted]. Thus, the first two prongs of the Younger test are met.
>
> "In addition, the third prong of the abstention inquiry -- the adequacy of opportunity to raise constitutional issues -- is satisfied by the plaintiffs' ability to raise constitutional claims during judicial review of the administrative proceedings. Haw.Rev.Stat. Section 286-260 (court may review whether director exceeded constitutional or statutory authority); see Dayton Christian Schools, 477 U.S. at 629, 106 S.Ct. at 2724 (even if constitutional claims cannot be raised in an administrative proceeding, it is 'sufficient ... [that they] may be raised in state court judicial review of the administrative proceeding'); Partington v. Gedan, 880 F.2d 116, 124 (9th Cir. 1989) (same), vacated in part on other grounds, 497 U.S. 1020, 110 S.Ct. 3265, 111 L.Ed.2d 776 (1990) [footnote omitted]." [Our Emphasis.]

FIFTH: The City contends that its cross-appeal, under the law expressed above in Aiona, supra, is not moot, for the reasons expressed in the "Conclusion" to its response to Nevada Entertainment's Petition for Rehearing

of this Court's November 2, 1993 opinion (which held that Huffman applied but would not express the law to be as was further upheld and explicated in Aiona). In its Conclusion, the City argued at pages 7-9:

> "Conclusion"
>
> "Appellant City of Henderson is of the view that this Court's three judge panel opinion, reported in 8 F.3d, at 1348-1353, is eminently correct in so far as it has applied the Huffman abstention doctrine to the narrow trial facts which were before the United States District Court.
>
> "The City of Henderson in this regard, however, makes these further contentions:
>
> "(1) The Court's opinion would have greater value to other federal appellate courts and litigants were it to more fully elaborate upon what it meant at page 1350, when it referred to "The considerations relied upon in Huffman." Did the Court mean, as the City of Henderson concluded, that the United States Supreme Court fashioned the Huffman rule (as to civil litigants) for the guidance of federal district courts so as to require them to abstain or require "heightened pleadings" where the pleadings show a strong probability that the assumption of federal jurisdiction would lead to the type of Tenth and Eleventh Amendment infringement of state

powers which occurred herein, as corroborated by the United State District Court's finding of fraud, retrospectively applied?

"(2) The cases cited by Nevada Entertainment and the Amicus Curiae do not affect this Court's opinion in as much as they are not apposite in this Huffman-type appeal which is controlled by an extremely narrow set of facts. Further, their analyses are defective in their apparent failure to weigh in the balance "the considerations relied upon in Huffman." The City of Henderson is of the further view that were this Court's opinion to be expanded to include an elaboration of its language "The considerations relied upon in Huffman," this Court's opinion would materially alter the manner in which the Huffman Doctrine is applied in those cases. It would appear, however, that if such opinion is not expanded, a substantial federal question will be raised which may require resolution by the United States Supreme Court.

"(3) Finally, the City is of the opinion that this Court's opinion requires a remand to the trial court for the exercise of the district court's discretion on the question of attorney's fees, in the light of the entire record (including this Court's opinion that the trial court erred in that the Huffman Doctrine should have been applied), and the City of Henderson's claim that, notwithstanding Nevada Entertainment's attorneys had both subjective and objective knowledge

> from existing case law that the narrow facts of record established a clear case for application of the Huffman Doctrine, they, neverthless, recklessly continued such litigation by remaining silent and refusing to address the City's arguments on the jurisdictional aspects."

This Court's November 2, 1993 opinion with respect to the application of Huffman should be reinstated and amended to conform to Aiona, and remanded for determination of an award of a reasonable attorney fee in favor of the City of Henderson under 42 U.S. 1988, for assessment against the Bond which was filed by Nevada Entertainment.

SIXTH: In four years of appellate litigation, which included two pre-trial applications to the Ninth Circuit Court of Appeal on extraordinary petitions for a writ of mandate and two applications to the U.S. Supreme Court on (pre-trial) petitions for writs of certiorari, the City of Henderson has contended that certain panels of the Ninth Circuit are

ignoring the Huffman test (Rule of Law) which the U.S. Supreme Court has mandated. Representative of that split of opinion is the differing opinions of Circuit Judges Kennedy and Tang in World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 (CA 9, 1987). See City of Henderson's Opening and Answering brief, at page 10 reading:

> "There appears to be a split of opinion within the Ninth Circuit on this issue, as demonstrated by the Ninth Circuit's handling of the matter in World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 (CA 9, 1987) [Tang and Kennedy]. The concurring Opinion of then-Circuit Judge Kennedy clearly follows the approach of the Sixth Circuit, which holds that it is 'jurisdictional,' and that a dismissal is mandated."

The City of Henderson contends that this Court's November 2, 1993 opinion (which addressed the Huffman issues) should not have been withdrawn but should have been modified.

All that this panel need do to

bring its interpretation of Huffman, as set forth in its opinion dated November 2, 1993, into compliance with the rule of law expressed in the Aiona case, which the City contends is clearly the law under the U.S. Supreme Court mandate in Huffman, would be to add the following sentence appearing in the Aiona case at page 1248:

> "If these three circumstances exist, then a 'district court must dismiss the federal action ... and there is no discretion to grant injunctive relief.'"

SEVENTH: The City contends that, in the light of the present legal controversy over the meaning of the Huffman test (Rule of Law) which has existed for the past three years as noted above, this Court cannot, consistent with due process and equal protection of the law principles of the federal constitution, and the evolution of common law "precedent" which depends

upon the correct resolution of such disputes, issue an order which precludes the decisions of this Court from being cited and considered in the Ninth and other Circuits of the federal court or in State Courts, in relation to the subject of such raging controversies, and such order should be vacated.

EIGHTH: At oral argument, Chief Judge Browning inquired as to why the jurisdiction issue (re federal courts) was so important to the City's interests. A partial explanation follows:

The record clearly indicates that there was no reasonable basis for the U.S. District Court to grant the injunctions issued herein (i.e. the temporary restraining order and the preliminary injunction). Federal injunctive relief allowed Federal Plaintiffs to freely conduct their operations in defiance of State law

pending "adjudication on the merits,", without making the requisite factual showing of "extraordinary circumstances," as required by Younger-Huffman. The City has suffered irreparable harm by being restained for a period of four years from enforcing valid state laws and valid state decisions.

It is the improper exercise of federal injunctive power that has "empowered" the Federal Plaintiffs and shielded them from the consequences of their fraudulant conduct, and which has enabled them to conduct their business and reap substantial monetary benefits, in defiance of Nevada state law. The disposition of this case by this Court of Appeal is grossly unfair. By failing to address the improper exercise of federal injuctive relief and by refusing to apply the Huffman test, the Court's action will only serve to encourage the

multiplication of fraudulent conduct. This is because the Court, in effect, has rewarded and encouraged the filing of federal complaints under 42 U.S.C. Section 1983, accompanied by requests for injunctive relief pending "final adjudication on the merit," as a method of "buying time" for recalcitrant business operators.

Fresh International Corp. v. Agricultural Labor Relations Bd., 805 F.2d 1353 (9th Cir. 1986), cited with approval in Aiona, supra, states that:

> "When a case falls within the proscription of Younger, a district court must dismiss the federal action. See Judice v. Vail, 430 U.S. 327, 337, 97 S.Ct. 1211, 1218, 51 L.Ed.2d 376 (1977). The Supreme court has stated expressly that '[w]here a case is properly within [the Younger] category of cases, there is no discretion to grant injunctive relief.' Colorado River Water Conservation District v. United STates, 424 U.S. 800, 816 n. 22, 96 S.Ct. 1236, 1246 n. 22, 47 L.Ed.2d 483 (1976)."

In a quasi-judicial administrative proceeding, Federal Plaintiffs were

found to have been guilty of fraud, having made misleading statements and misrepresentations in connection with their application for a City business license. A deliberate misrepresentation to a governmental licensing agency can never be immaterial. The manner in which the federal courts have handled this case has caused irreparable harm to the City of Henderson, as was stated to the U.S. District Court by the City in oral argument opposing the issuance of a temporary restraining order [see Reporter's Transcript for April 27, 1990 (hearing on temporary restraining order), appearing at Appellees' Supplementary Excerpts of Record (hereinafter referred to as "SER"), at Exhibit 18, pages 13-14]:

> "The harm -- there is irreparable harm to the City because what it does, this type of case sends a message to the public that it's okay to make misrepresentations, that it's okay to lie on your application form if you don't agree

> with an ordinance of the City, and the, if the City should find out about it and seeks to revoke your license, then all you have to do is seek equitable relief to stay open. And that is contrary to the fundamental principle of he who comes into a court of equity must come with clean hands. And that is exactly the situation we have here."

See also SER 18, at page 15:

> "The real issue here is whether the City may revoke a license for fraud. And I just want to read a quote from a case, New York Football Giants, Inc., versus Los Angeles Chargers Football Club, Inc., 291 F.2d 471 at 474, a 1961 case. Quote, 'We think no party has the right thus to create problems by its devious and deceitful conduct and then approach a court of equity with a plea that the pretended status which it has foisted on the public be ignored and its rights be declared as if it had acted in good faith throughout.'

Immediately thereafter, at SER 18, page 16, the Federal Plaintiffs clearly indicated that they wanted to "reargue" to the Federal Court matters decided by the state quasi-judicial administrative decision:

> "....We do not concede that

> the application was false or fraudulent....
>
> "Once this case reaches the merits, we're going to have evidence before this Court, as we did present before the Henderson City Council, that the City Council and the City officials knew all along what this business was going to be like, that nobody was fooled, and that the application form itself was not deceptive of an official --"

It is clear from the record that the U.S. District Court had no discretion to grant injunctive relief. The U.S. District Court, in issuing its Temporary Restraining Order and Preliminary Injunction, required that Federal Plaintiffs post a bond in the amount of $10,000 and $20,000, respectively. The City of Henderson contends that it is entitled to forfeiture of the entire amount as part of the costs and damages the City has incurred during the four-year pendency of the federal injunctions which ultimately never should have issued. Nintendo of America, Inc. v. Lewis

Galoob Toys, Inc., 94 DJ DAR 2055.

Dated: May 17, 1994

Respectfully submitted,

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James J. Clancy